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Complaint

I

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343(3) and §1343(4). This is a suit in equity authorized and instituted pursuant to Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. §§2000a et seq., and 42 U.S.C. §1983. The jurisdiction of the Court is invoked to secure protection of civil rights and to redress deprivation of rights, privileges, and immunities secured by (a) the Fourteenth Amendment to the Constitution of the United States, §1; (b) the Commerce Clause, Article I, §8, Clause 3 of the Constitution of the United States; (c) Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. §§2000a et seq., providing for injunctive relief against discrimination in places of public accommodation; and (d) 42 U.S.C. §1981, providing for the equal rights of citizens and all persons within the jurisdiction of the United States.

II

This is a proceeding for an injunction restraining defendant from continuing or maintaining any policy, practice, custom and usage of withholding, denying, attempting to withhold or deny, or depriving or attempting to deprive or otherwise interfering with the rights of plaintiffs and others similarly situated to admission to and full use and enjoyment of the goods, services, facilities, privileges, advantages and accommodations of the Lake Nixon Club, Little Rock, Pulaski County, Arkansas.

III

The plaintiffs are (Mrs.) Doris Daniel and (Miss) Rosalyn Kyles both of whom are Negro citizens of the

United States and the State of Arkansas who reside in the City of Little Rock, Pulaski County, Arkansas. Plaintiffs bring this action on behalf of themselves and on behalf of all others similarly situated, pursuant to Rule 23 (a)(3) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of other Negro persons to purchase and/or enjoy the goods, services, facilities, privileges, advantages and accommodations of the facility known as the Lake Nixon Club who are so numerous as to make it impracticable to bring them all individually before this Court. A common relief is sought and the interests of this class are adequately represented by plaintiffs.

IV

Defendant Euell Paul, Jr., is the owner, manager or operator of the facility known as the Lake Nixon Club located near the City of Little Rock, Pulaski County, Arkansas. Said Lake Nixon Club is a place of public accommodation within the meaning of Title 42 U.S.C. 2000 (a) et seq. Lake Nixon serves and offers to serve interstate travelers. A substantial portion of the food and other items which it serves and uses moves in interstate commerce. Its operations affect travel, trade, commerce, transportation, or communication among, between and through the several states and the District of Columbia.

V

On or about July 10, 1966, plaintiffs attempted to enter facility known as the Lake Nixon Club. Defendant or his agent refused the plaintiffs entry to the said Lake Nixon Club on the ground that the Membership of Lake Nixon Club was full and that no new memberships were

being accepted. On information and belief, the real reason for plaintiffs non-admittance was their race or color.

VI

Plaintiffs further allege on information and belief that the Lake Nixon Club is operated under the guise of being a private club solely for the purpose of being able to exclude plaintiffs and all other Negro persons. Plaintiffs allege on information and belief that any white person may be admitted to the use and enjoyment of the facilities of the Lake Nixon Club by merely presenting the entry fee.

VII

Plaintiffs allege that the racially discriminatory practices of defendant are in continuance of a well established and maintained policy of refusing plaintiff and others of their race admission to and enjoyment of the facilities of the Lake Nixon Club. The State of Arkansas has no State law, and the County of Pulaski and the City of Little Rock have no local laws or ordinances prohibiting the racially discriminatory practices complained of herein and establishing or authorizing a State or local authority to grant or seek the relief prayed for herein. Plaintiffs have no plain, adequate or complete remedy at law to redress these wrongs, and this suit for injunction is the only means of securing adequate relief. Plaintiffs are now suffering and will continue to suffer irreparable injury from defendant's policy, practice, custom and usage as set forth herein until enjoined by the Court.

Wherefore, plaintiffs respectfully pray this Court advance this cause on the docket, order a speedy hearing at the earliest practicable date, and upon such hearing to:

1. Forever enjoin defendant, his agents, successors, employees, attorneys, and those acting in concert with him and at his direction from continuing or maintaining any policy, practice, custom or usage of denying, abridging, segregating, withholding, conditioning, limiting, or otherwise interfering with plaintiff and others of his race in the admission to use of, and enjoyment of the goods, services, facilties, privileges, advantages, accommodations, etc., of the Lake Nixon Club on the basis of race or color as contrary to the Fourteenth Amendment to the Constitution of the United States, the Commerce Clause, Article I, §8, Clause 3 of the Constitution of the United States, Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. §2000a et seq., and 42 U.S.C. §1981.

2. Allow plaintiffs their costs herein, reasonable attorney fees and such other, additional, or alternative relief as may appear to the Court to be equitable and just.

Respectfully submitted,

John W. Walker
1304-B Wright Avenue
Little Rock, Arkansas 72206

Jack Greenberg
Michael Meltsner
10 Columbus Circle
New York, New York 10019

Answer

Comes the Defendant herein, Euell Paul, Jr., and in answer to the Complaint filed herein, states:

(1) The Defendant admits the jurisdiction of this Court but denies that Plaintiff has been denied any Constitutional right by this Defendant.

(2) Admits the nature of this action.

(3) Admits the allegations of Paragraph III of Complaint.

(4) Admits that he is one of the owners of the Lake Nixon Club. Denies that the Lake Nixon Club is a place of public accommodation within the meaning of Title 42 U.S.C. 2000(a) et seq. Denies the Lake Nixon serves or offers to serve interstate travelers within the meaning of the laws of the United States. Denies that a substantial portion of the food and other items which it serves and uses moves in interstate commerce. Denies that its operations affect travel, trade, commerce, transportation or communication between and through the several States and the District of Columbia within the meaning of Title 42 U.S.C. 2000(a) et seq.

(5) The Defendant admits the allegation in Paragraph V of the Complaint.

(6) Defendant denies that the Lake Nixon Club is operated as a club solely for the purpose of being able to exclude Negroes. Denies that any white person may be admitted to the use and enjoyment of the Club by paying the entry fee.

(7) Defendant denies that part of Paragraph VII of the Complaint which alleges that Plaintiff will be injured in

any manner by being denied admission to Defendant's swimming pool.

(8) Further answering, Defendant states that he operates Lake Nixon Club as a place to swim, that he has a large amount of money invested in the facility, and that if he is compelled to admit Negroes to the Lake, he will lose the business of white people and will be compelled to close his business. The value of his property will be destroyed and he will be deprived of his rights under the Fourteenth Amendment to the Constitution of the United States.

Wherefore, Defendant prays that Plaintiff's Petition for an injunction be denied; for his costs herein and for all other proper relief.

Interrogatories

To: Mr. Sam Robinson

115 East Capitol Street
Little Rock, Arkansas

Plaintiffs request that the defendant, Enell Paul, Jr., answer under oath in accordance with Rule 33 of the Federal Rules of Civil Procedure the following Interrogatories:

1. List the kinds of licenses which you have obtained relative to the operation of the Lake Nixon Club.
2. Where have you advertised during the last twelve months? Give the dates, places and content of such advertisements.
3. State whether any interstate travelers have become members of the Lake Nixon Club or otherwise used the facilities of the Lake Nixon Club.
4. List the names and addresses of the suppliers who supply the goods and products which are sold at Lake Nixon Club.
5. Set out the amount spent by Lake Nixon Club for food purchases and other supplies during the period September 1, 1965, and September 1, 1966.
6. State whether or not either of the following items is served or sold at the Lake Nixon Club: (a) coffee, (b) tea, (c) beef (hamburgers, etc.), (d) cigars, (e) chewing gum, (f) sugar, (g) beer, (h) soft drinks.
7. What was the annual gross income of the Lake Nixon Club for each of the last two years? (Please provide a profit and loss statement as appendix to this answer.)

Interrogatories

8. List the names of the insurance companies which insure Lake Nixon Club and set out the types of coverage provided for each.

9. List the names and addresses of the financial institutions with whom Lake Nixon Club does business?

10. Has Lake Nixon Club obtained any loans from any financial institution or individual within the last two years? If answer is affirmative, state the name of such institution or individual.

11. State the name and address of the owner of the real property under the management of Lake Nixon Club.

12. State whether the property specified in Interrogatory 11 is under the control of Lake Nixon Club pursuant to a lease or rental agreement. If answer is affirmative, attach a copy of such agreement to this interrogatory. If answer is negative set out in detail the arrangement between Lake Nixon Club and the owner of said property and specify the date made.

13. Attach a copy of the Articles of Incorporation and by-laws of the Lake Nixon Club to this interrogatory.

14. List for each officer of the Lake Nixon Club the following: names, office held, date elected and address.

15. Set out the dates of the meetings, regular or special, held by defendant, the number of persons present at each and the names of same.

16. List the criteria for membership in the Lake Nixon Club.

17. List the criteria for non-membership use of Lake Nixon Club.

Interrogatories

18. State whether prior to July 2, 1964, Lake Nixon was operated as a racially segregated facility.

19. State whether membership cards in the Lake Nixon Club are offered and issued to white persons who seek to use Lake Nixon if those persons pay the membership fee.

20. State the amount of the membership fee in the Lake Nixon Club and also the period of time such fee entitles members to club privileges.

21. State whether membership cards in the Lake Nixon Club are offered and issued to Negro persons who seek to use the Lake Nixon Club if those persons pay the membership fee.

22. State whether the Lake Nixon Club has a committee responsible for screening applicants for membership. If so, state the name of such committee, the names, addresses and telephone numbers of present committee members, the dates of their meetings during 1966, their responsibilities, the number and names of persons added by the committee to the membership rolls during 1966 and the race of such persons, the number of such persons rejected by said committee during 1965 and the race of such persons.

23. State whether white persons seeking admission thereto were routinely admitted (conditionally or otherwise) to the Lake Nixon Club upon payment of the initial fee of membership plus other admission costs.

24. State whether Negro persons seeking admission thereto were routinely denied (conditionally or otherwise) admission to and/or membership in the Lake Nixon Club.

Interrogatories

25. State whether plaintiffs attempted to use the facilities of Lake Nixon Club during July, 1966. If so, state whether they were offered membership cards and otherwise explain in detail the response given to plaintiffs by you or your employee at aforesaid time.

26. State what constitutes membership in Lake Nixon Club that is "filled up" or full.

27. State whether John L. Parke is a member of Lake Nixon Club? Robert Davis? John Denvir? John Lewis?

Please take notice that answers to the foregoing Interrogatories should be served upon plaintiff's counsel within fifteen days from this date.

Answers to Interrogatories

To: Mr. John W. Walker

1304-B Wright Avenue
Little Rock, Arkansas

Comes Euell Paul, Jr., and for his Answers to Plaintiffs' Interrogatories, states:

Interrogatory No. 1. List the kinds of licenses which you have obtained relative to the operation of the Lake Nixon Club.

Answer: None.

Interrogatory No. 2. Where have you advertised during the last twelve months? Give the dates, places and content of such advertisements.

Answer: KALO Radio, Friday Night Beach Party, advertised Wednesday, Thursday and Friday from last day of May through September 7th.

Little Rock Today (Monthly Magazine) one time in May.

Little Rock Air Force Base (Monthly Paper) one time in June.

Interrogatory No. 3. State whether any interstate travelers have become members of the Lake Nixon Club or otherwise used the facilities of the Lake Nixon Club.

Answer: Not that I know of.

Interrogatory No. 4. List the names and addresses of the suppliers who supply th goods and products which are sold at Lake Nixon Club.

Answer: K. Brown Packing Company, Vogel's, Inc., Muswick Beverages, Bordon's of Arkansas, Wonder Bakery, Frito-Lay, and Coca Cola Bottling Company.

Interrogatory No. 5. Set out the amount spent by Lake Nixon Club for food purchases and other supplies during the period September 1, 1965, and September 1, 1966.

Answer: $5,550.87.

Interrogatory No. 6. State whether or not either of the following items is served or sold at the Lake Nixon Club: (a) coffee, (b) tea, (c) beef (Hamburger, etc.), (d) cigars, (e) chewing gum, (f) sugar, (g) beer, (h) soft drinks.

Answer: We do not sell or serve coffee, tea, beef (as such), cigars, chewing gum, sugar or beer. We do sell hamburgers and soft drinks.

Interrogatory No. 7. What was the annual gross income of the Lake Nixon Club for each of the last two years? (Please provide a profit and loss statement as appendix to this answer.)

Answer: 1965 Gross Income $41,170.00, Operating Expenses and Depreciation $26,048.72; 1966 Gross Income $46,326.00, Operating Expenses and Depreciation $28,434.00. This indicates the profit and loss.

Interrogatory No. 8. List the names of the insurance companies which insure Lake Nixon Club and set out the types of coverage provided for each.

Answer: Fireman's Fund Insurance Company: Bodily injury, property damage, workmen's compensation, products.

Interrogatory No. 9. List the names and addresses of the financial institutions with whom Lake Nixon Club does business?

Answer: Benton State Bank, Benton, Arkansas and First National Bank, Little Rock, Arkansas.

Interrogatory No. 10. Has Lake Nixon Club obtained any loans from any financial institution or individual within the last two years? If answer is affirmative, state the name of such institution or individual.

Answer: No loans have been obtained.

Interrogatory No. 11. State the name and address of the owner of the real property under the management of Lake Nixon Club.

Answer: My wife and I own the property and live there at Lake Nixon.

Interrogatory No. 12. State whether the property specified in Interrogatory 11 is under the control of Lake Nixon Club pursuant to a lease or rental agreement. If answer is affirmative, attach a copy of such agreement to this interrogatory. If answer is negative set out in detail the arrangement between Lake Nixon Club and the owner of said property and specify the date made.

Answer: Lake Nixon Club is owned by my wife and I. No other arrangement.

Interrogatory No. 13. Attach a copy of the Articles of Incorporation and by-laws of the Lake Nixon Club to this interrogatory.

Answer: It is not incorporated.

Interrogatory No. 14. List for each officer of the Lake Nixon Club the following: name, office held, date elected and address.

Answer: There are no officers.

Interrogatory No. 15. Set out the dates of the meetings, regular or special, held by defendant, the number of persons present at each and the names of same.

Answer: There have been no meetings.

Interrogatory No. 16. List the criteria for membership in the Lake Nixon Club.

Answer: My wife and I exercise our own judgment and refuse those we do not want.

Interrogatory No. 17. List the criteria for non-membership use of Lake Nixon Club.

Answer: There is no non-membership use of the facilities.

Interrogatory No. 18. State whether prior to July 2, 1964, Lake Nixon was operated as a racially segregated facility.

Answer: Yes.

Interrogatory No. 19. State whether membership cards in the Lake Nixon Club are offered and issued to white persons who seek to use Lake Nixon if those persons pay the membership fee.

Answer: In most cases.

Interrogatory No. 20. State the amount of the membership fee in the Lake Nixon Club and also the period of time such fee entitles members to club privileges.

Answer: Twenty-five cents for one season.

Interrogatory No. 21. State whether membership cards in the Lake Nixon Club are offered and issued to Negro persons who seek to use the Lake Nixon Club if those persons pay the membership fee.

Answer: No.

Interrogatory No. 22. State whether the Lake Nixon Club has a committee responsible for screening applicants for membership. If so, state the name of such committee, for names, addresses and telephone numbers of present committee members, the dates of their meetings during 1966, their responsibilities, the number and names of persons

added by the committee to the membership rolls during 1966 and the race of such persons, the number of such persons rejected by said committee during 1965 and the race of such persons.

Answer: There is no committee.

Interrogatory No. 23. State whether white persons seeking admission thereto were routinely admitted (conditionally or otherwise) to the Lake Nixon Club upon payment of the initial fee of membership plus other admission costs.

Answer: Yes.

Interrogatory No. 24. State whether Negro persons seeking admission thereto were routinely denied (conditionally or otherwise) admission and/or membership in the Lake Nixon Club.

Answer: I cannot say that we refuse Negroes admission to the swimming pool as a routine matter because only two or three Negroes, I forget which, ever sought admission to the pool and that was in the summer of 1966. At that time, we refused admission to them because white people in our community would not patronize us if we admitted Negroes to the swimming pool. Our business would be ruined and we have our entire life savings in it.

Interrogatory No. 25. State whether plaintiffs attempted to use the facilities of Lake Nixon Club during July, 1966. If so, state whether they were offered membership cards and otherwise explain in detail the response given to plaintiffs by you or your employee at aforesaid time.

Answer: We do not know the plaintiffs, but we did refuse admission to two or three Negroes. We told them the membership was closed.

Interrogatory No. 26: State what constitutes membership in Lake Nixon Club that is "filled up" or full.

Answer: It has never been "Filled up" or full.

Interrogatory No. 27. State whether John L. Parke is a member of Lake Nixon Club? Robert Davis? John Denvir? John Lewis?

Answer: I do not know whether these persons are members.

Signed: Euell Paul, Jr.

On this day personally appeared before me, Euell Paul, Jr., and after first being duly sworn, stated that the Answers to the foregoing Interrogatories are true.

Linda J. Grass
Notary Public

My Commission Expires:
Sept. 20, 1970

Be it remembered, that the above entitled and numbered causes came on to be heard before Honorable J. Smith Henley, United States District Judge, at Little Rock, Arkansas, on December 7, 1966, wherein the following proceedings were had, to wit:

Appearances:
In LR-66-C-149

For Plaintiffs: Mr. John W. Walker, Attorney at Law,
1304-B Wright Avenue,
Little Rock, Arkansas

For Defendant: Mr. Sam Robinson, Attorney at Law,
Adkins Building,
Little Rock, Arkansas

Proceedings

The Court: Gentlemen, we have this morning 1966 Cases C-149 and 150, set for trial at the same time, I don't know that they're necessarily consolidated, but many of the questions, I assume, may be common to both.

Gentlemen, for the Plaintiff, are you ready to proceed in these cases?

Mr. Walker: We're ready, Your Honor.

The Court: And for the defendants, Judge Robinson and Mr. Carroll?

Judge Robinson: The defendant Paul is ready, may it please the Court.

Mr. Carroll: The defendant Culberson and Spring Lake, Inc., are ready, Your Honor.

The Court: Very well.

Mr. Walker, you may proceed. I guess you're the plaintiff in both cases and have the burden.

Mr. Walker: I don't think an opening statement is necessary, Your Honor.

The Court: You may assume that the Court has read the files, and including the answers to the interrogatories that have been filed, and is reasonably familiar with the issues and that you may forego opening statements, if you wish.

Mr. Walker: Thank you.

I would like to call Mr. Euell Paul.

The Court: Mr. Paul in Court? Come around.

Proceedings

EUELL PAUL, called as a witness by and on behalf of Plaintiff, being duly sworn, was examined and testified as follows:

Direct Examination
Questions by Mr. Walker:

Q. Will you state your name, your address and your occupation, please?

A. Euell Paul, Jr., Route 1, Box 77-A, engaged in recreation.

Q. I asked you to bring your insurance policy with you. Do you have that?

A. Yes, sir.

Q. Mr.—

The Court: Let's see, Mr. Paul, is the defendant in 149, is that correct?

Mr. Walker: That's right, Your Honor.

(Documents passed to counsel.)

Q. Mr. Paul, I hand you two insurance policies, which are made out in your name and your wife's name, I presume, Euell Paul, Jr., Oneta Paul, d/b/a, doing business as Lake Nixon, and ask if you're familiar with them?

A. Yes, sir.

Q. These policies are written by Firemen's Fund Insurance Company, is that correct?

A. Yes, sir.

Q. Did you take those policies out yourself?

A. Yes, sir.

Q. Now, would you state to the Court whether Lake Nixon is a private club?

A. Yes, sir.

Q. It is a private club; what are the purposes of the club?

A. Swimming.

Q. What else?

A. Just general relaxation.

Q. Any other purpose?

A. No, sir.

Q. Do you have incorporation papers?

A. No.

Q. Yours is an unincorporated club?

A. Yes, sir.

Q. What are the membership criteria?

A. You mean the amount?

Q. No; what does it take to become a member of your club?

A. The approval of my wife and I.

Q. The approval of your wife and yourself?

A. Yes.

Q. Anybody else?

A. No, sir.

Q. Now, what criteria do you have for deciding whether to include someone?

The Court: Mr. Walker, I'm reluctant to interrupt you. Haven't you covered the material you're now covering in your interrogatories and the—

Mr. Walker: To a limited extent, Your Honor.

The Court: Go ahead.

The Witness: Would you repeat the question, please?

Mr. Walker: Yes.

Q. What considerations do your wife and yourself use in determining whether to admit someone to the club?

A. We judge on the basis of how we feel they will get along with the—together.

Q. Together; isn't it true you admit any white person?

A. Pardon?

Q. Isn't it true you admit any white person to membership—

A. No, sir.

Q. Just as long as that person is well mannered?

A. Not in all cases, no.

Q. As long as he is well mannered and dressed properly you will admit him, don't you?

A. In some cases.

Q. In almost all cases?

A. In a large majority.

Q. How many members do you have?

A. Well, I do not know.

Q. How frequently does the club meet?

A. Every day.

Q. You mean the members of the club?

A. Periodically.

Q. What periods?

A. Well, mostly on sunny days.

Q. Do you have membership meetings?

A. No, sir.

Q. Have you ever had a membership meeting?

A. No, sir.

Q. Would you know how to get in touch with the membership if you wanted to?

A. No.

Q. Does the club—

A. Could I retract that? In one way, notification on the bulletin there at the club.

Q. Now, do the members of the club have the responsibility for naming the employees of the club?

A. No.

Q. That is you and your wife's exclusive responsibility?

A. Yes.

Q. Do the members of the club have the responsibility for fixing your salary?

A. No.

Q. You fix that yourself?

A. Yes, sir.

Q. Do the members of the club have any responsibility with regard to distribution of the profit that you make?

A. No.

Q. Did you advertise for persons to come and make use of the facilities during the summer.

A. Members only.

Q. Did you advertise for members?

A. Not that I can remember.

Q. But you do recall—

A. I've written so many that I didn't keep copies of them, which I should have, I didn't know this would happen, and I didn't keep copies of them, but to my knowledge as far as I know all ads were written stated strictly to members only.

Q. You were not inviting new members to join?

A. Not that I can remember, no.

Q. Why did you advertise then?

A. To let the members know what was taking place.

Q. How many members did you have?

A. I don't know.

Q. Do you have any way of guessing how many you had the 1st of May?

A. No, sir.

Q. Would you say that you had a thousand at that time?

A. First of May?

Q. Yes.

A. No, sir, because we weren't open.

Q. Right; but you did advertise then to get members, didn't you?

A. No, because most people from the previous year and previous years before that renewed membership cards when we first started.

Q. Have you ever heard any of the advertisements on KALO or KAAY?

A. I run one on KAAY and the rest on KALO, but I wasn't able to hear all of them.

Q. Are you not aware they were inviting people generally to come out to Lake Nixon?

A. Our opening statement was basically, well, specifically stated that it was for members only.

Q. For members only?

A. Yes.

Q. But some of the people who came subsequent to May were not members only?

A. Some of the members brought other people.

Q. Other people came without other members, didn't they? Individuals?

A. Yes, that's right.

Q. Individuals came; did you ever pass out any membership cards without having a name set forth on the membership card?

A. Not to my knowledge; they were made to sign them right there.

Q. They were made to sign them right there?

A. Yes, sir.

Q. I show you what purports to be a Lake Nixon membership card, and ask you to identify that?

A. That is mine.

Q. That is yours; is there a name on that?

A. No, sir.

Q. I wonder how could one person obtain one of these without a name being on it?

A. At the main gate.

Q. At the main gate?

A. Yes.

Q. So that possibly your employees did just distribute them to some people that they wanted to distribute them to, is that right?

A. I hope not; but far as I know they didn't distribute them.

Mr. Walker: I'll mark this as Plaintiff's Exhibit No. for identifications, and I would like to have it introduced into the record.

(Thereupon, the document above referred to was marked as Plaintiff's Exhibit No. 1, for identification.)

The Court: Any objection, Gentlemen?

Judge Robinson: No, sir.

The Court: Let it be received.

(Thereupon, the document heretofore marked as Plaintiff's Exhibit No. 1, for identification, was received in evidence.)

Q. Now, do you know whether a man by the name of John Denver ever applied for membership?

A. No, sir.

Q. You don't know; of John Lewis? I show you two membership cards, the same as those, but these are signed, and ask are these yours?

A. Yes, they sure are.

Mr. Walker: I would like to have them marked Plaintiff's Exhibits 2-A and B.

(Thereupon, the documents above referred to were marked as Plaintiff's Exhibits 2-A and B, for identification.)

The Court: Which one is 2-A?

Mr. Walker: Denver, and Lewis is 2-B.

The Court: Let them be received.

(Thereupon, the documents heretofore marked as Plaintiff's Exhibits 2-A and B, for identification, were received in evidence.)

Q. Now, are you aware of the fact that you have a listing in the phone directory?

A. Yes.

Q. Are you also aware of the fact that there is a category in the yellow pages called "Private Clubs"?

A. Yes, I do.

Q. Are you aware of the fact that the Lake Nixon Club is not listed in that category in the yellow pages?

A. I am aware of that, due to a mistake.

Q. But it is not there; now, were you present when the plaintiffs sought to use the facilities of Lake Nixon?

A. No, sir.

Q. You were not; your wife was on duty at that time?

A. Yes.

Q. Now, to the best of your knowledge were the plaintiffs well mannered?

Judge Robinson: I believe he said he was not present at that time.

Mr. Walker: He has obviously had some conversation with his wife about that, and rather than have her testify—we can if you want to.

Q. Were they well mannered to the best of your knowledge?

A. Far as I know.

Q. Did they use any boisterous language or anything like that?

A. I don't know, I didn't go into any detail, and I wasn't there and I don't know.

Q. What did your wife tell them to the best of your knowledge?

A. That they would not be accepted.

Q. That they would not be accepted?

A. That the membership was full.

Q. Was the membership in fact full?

A. It has never been full.

Q. It has never been full?

A. It was full at that particular time of day.

Q. If these persons had been white what reason would you have had to reject them?

The Court: Mr. Walker, I wonder if that really is a proper question. Nobody knows what reason he might have had for rejecting them if they had been white. They could have been drunk or disorderly or some other condition that would have caused him to reject them. Really what you're getting at, I think, is simply were these people rejected because they were Negroes. Isn't that what you want to know?

Mr. Walker: Your Honor, I didn't put it that way but that's really what I wanted.

The Court: Let's get down to it, let's call a spade a spade and get right down to it. Is that why they were refused?

The Witness: Yes, sir.

The Court: All right.

Mr. Walker: Thank you, Your Honor.

Q. Now, isn't it true that from time to time non-members did use the facilities of Lake Nixon?

A. Really not to my knowledge. We kept a close eye on it.

Q. Didn't you state in your answer to the interrogatories that from time to time—well, didn't you state in your interrogatories, your answers, that from time to time persons other than members who were members of parties or groups were permitted to use the facilities?

A. Not unless they had a membership card.

Q. Did you give them a membership card for twenty five cents per person?

A. If they were on the premises and we knew about it.

Q. They had a membership card?

A. They had to have it. In fact,—

Q. What was the amount of membership?

A. Twenty five cents.

Q. Was this payable once per year?

A. Yes.

Q. Was there also an admission fee?

A. Yes.

Q. What was that?

A. Depending on what they wanted to do.

Q. Lets put it this way: The first time one would come to the Lake Nixon Club he would pay a twenty five cents membership fee?

A. If he was accepted.

Q. If he was accepted?

A. Yes.

Q. And then he would have to pay an admission into the park, into your amusement area, isn't that true?

A. Depending on what he wanted to do. Not necessarily. They could sit and do nothing and it didn't cost them anything.

Q. I see; all right, spell out what the cost were for doing a particular thing?

A. The swimming was fifty cents, if they were going to swim; and the boat rides were twenty five cents per person; the miniature golf was thirty five cents.

Q. What about the dances?

A. There was a dollar charge.

Q. One dollar charge for the dances; all right, now, you have a number of boats there; will you describe those boats?

A. They are just aluminum paddle boats.

Q. They are aluminum paddle boats?

A. Seat three or four people.

Q. I see, how many do you have?

A. Fifteen.

Q. Fifteen; what was the cost of each one, average cost?

A. We didn't buy them.

Q. You didn't buy them; are you renting them?

A. We lease them.

Q. What is the lease cost?

A. Based on the amounts that we do on them.

Q. So there's a percentage?

A. Yes, sir.

Q. What is that percentage?

A. I would have to look at the books.

Q. Would you say twenty five percent of what ever gross profit you receive?

A. I couldn't really say; my wife would know; it's in the books.

Q. Do you have something that might be described as hydroplanes?

A. No.

Q. Do you have any other kind of boats there?

A. We have what we call a yak.

Q. A yak; what's a yak?

A. It's similar to a surfboard.

Q. Similar to a surfboard; do you know where you purchased that?

A. From the same company.

Q. What company is that?

A. Aqua Boat Company.

Q. Who?

A. Aqua Boat Company.

Q. Is that a local Company?

A. No.

Q. Where is it?

A. I believe they're in Oklahoma, Bartlesville.

Q. Now, do you have any record player or juke boxes or anything like that out there?

A. Yes, sir.

Q. How many do you have?

A. Two.

Q. Two; the members, of course, entertain themselves with the juke boxes?

A. Yes.

Q. Now, these—I mean persons who put their nickels and dimes in any time during the day and get music and dance or whatever they want to do, is that right?

A. Right.

Q. Where did you get those juke boxes, a local amusement company?

A. Yes.

Q. What is the name of it?

A. I believe my wife knows; I can't remember the name.

Q. Do you know where those juke boxes happen to have been made?

A. No, sir, I don't.

Q. You have a place to dance there too, don't you?

A. Yes.

Q. And you customarily have dances on Friday nights and Saturday nights?

A. Mostly on Friday nights; very seldom on Saturday night; depending, if the weather is bad on Friday we switch to Saturday.

Q. Every week you've had a dance, if the weather—

A. Permits.

Q. Did you also have a concession stand there?

A. Yes.

Q. What concessions did you sell; what did you sell?

A. Basically hamburgers, hot dogs, and so on.

Q. Could you tell me how much money you spent for concessions during the 1965-66 year—well, during the summer of 1965?

A. I believe it is all in the records there, in the books.

Q. May I see them?

A. You sure can.

The Court: Isn't that in Interrogatory No. 5?

Mr. Walker: It is not in there, Your Honor. The profit and loss — of course, the profit was; it does not set out what the expenses are.

The Court: Interrogatory No. 5 sets out the amount spent by Lake Nixon for food purchases and other supplies during the period September 1, '65, and September 1, '66.

Mr. Walker: Right. My question is slightly different, Your Honor. I'm asking about concessions here, just the concession items. The supplies, perhaps, including a number of other things, items to clean the boats, things to keep up the — —

The Court: Well, if you have that readily available, Judge Robinson, the books there — —

The Witness: I imagine I can give you approximately.

Q. That's all I want.

A. Just approximately?

Q. Just approximately?

A. You mean what we spent for — —

Q. For concessions?

A. For the concession stand?

Q. Yes.

The Court: In 1965?

The Witness: I believe it ran some where pretty close together both years, usually around from five to six thousand.

Q. Five to six thousand dollars; now, will you state the percentage of income you received, the amount of your sales from the concessions?

A. I would say fifteen hundred to two thousand.

Q. Fifteen hundred to two thousand dollars profit, that's net profit?

A. I would say yes.

Q. So your gross sales would be considerably more than seven thousand dollars, isn't that true?

A. Yes, it is.

Q. Now, you did sell quite a few hamburgers, didn't you?

A. That is true.

Q. And that is the item probably that you sold most of, isn't it, among sandwiches?

A. I don't know, because the snack bar, we didn't run the snack bar.

Q. You didn't?

A. My sister-in-law, she took it over; I didn't have time to — —

Q. Did you lease it to your sister-in-law?

A. Not under a written lease, just an agreement, mutual agreement.

Q. But you shared the profits?

A. We shared with her.

Q. But sales from sandwiches and the like did account for a large degree of your gross sales; is that true?

A. No, very minor what we make off of that; food was a just a commodity to have there for the people if they wanted it; I mean we were not in the food business — there was no restaurant — it was just a necessity.

Q. If you do have your records broken down I would like to see those.

A. I sure do.

Mr. Walker: I will go on while you look for that, Mr. Robinson.

Q. Now, did you have bands out at your place on the week ends?

A. Yes.

Q. Were they local bands?

A. Yes.

Q. Do you know whether those bands happened to play in Jacksonville?

A. No.

Q. You really don't know where they played, do you?

A. Yes, I'm pretty certain they played just right here in Little Rock.

Q. Just for you; what band was it?

A. Well, we had the Romans, the Loved Ones. I can't remember the names of all — —

Q. You had a lot of different bands?

A. Yes.

Q. How can you be sure that they just played in Little Rock?

A. Because they were members there and were frequently out there; they mostly worked in town and this was a hobby; they were not professionals.

Q. You really don't know whether they did or not, do you?

A. If they left the state I didn't know about it.

Q. All right, how much income did you obtain from admission?

A. To what particular — —

Q. Just generally admissions to what ever you had?

A. You mean what the gross was off the whole business?

Q. No, no, just your admissions; do you have your records broken down into receipts for admissions and membership from concession sales?

A. Everything was completely broken down and itemized.

Mr. Walker: Have you found that?

The Court: Let me suggest we might save a little time if we would take a few minutes recess and let you all go over this and point to Mr. Walker exactly what he wants, and then when we resume we'll put into the record only that portion that is desired and we won't encumber it with a good bit of material that no one wants.

Mr. Walker: Your Honor, I think that we can perhaps — I'm about finished with the witness — and we could perhaps stipulate with Mr. Robinson later.

The Court: Could you undertake to write it out on a piece of paper then and file it?

Mr. Robinson: Yes, Your Honor.

The Court: All right, go right ahead then and interrogate the witness on matters other than these figures and

at an appropriate time you make an abstract of them and file them.

Q. Did you also have milk sales?

A. What?

Q. Milk sales in your concessions?

A. We sold milk, yes.

Q. You did sell milk?

A. Yes.

Q. Did you sell pints, half pints?

A. Little half pints.

Q. Little half pints; that was with which dairy?

A. Borden's.

Q. Borden's; how many cartons do you think you would use in the course of a week?

A. I don't know.

Q. You also sold a lot of soft drinks, isn't that true?

A. Yes, sir.

Q. Now, we have propounded to you certain interrogatories which I would like to have introduced into the record at this time as Plaintiff's Exhibit 3.

The Court: I don't believe we'll give them an exhibit number, Mr. Walker, but they will be considered as part of the hearing record.

Mr. Walker: That's perfectly satisfactory.

The Court: They are already in the file; they were filed on November 3rd.

Mr. Walker: I have no more questions of this witness, Your Honor.

Mr. Robinson: I don't believe I have any questions in the nature of cross-examination. I think — —

The Court: If you prefer, it might be more orderly, you can defer what would be your direct examination until you are presenting your case.

Mr. Robinson: All right.

The Court: You may stand aside.

(Above witness temporarily excused.)

* * * * *

EUELL PAUL, JR., being recalled was examined and testified as follows:

Cross Examination Questions by Mr. Robinson:

The Court: You may testify under the same oath you took earlier, Mr. Paul.

Q. Mr. Paul, you were asked about insurance policies that you had protecting your business out there; did you buy this insurance from the Gulley Insurance Agency here in the City of Little Rock?

A. Yes, sir.

Mr. Robinson: That is all.

Mr. Walker: No more questions.

The Court: That's all, Mr. Paul.

(Above witness temporarily excused.)

Mr. Walker: Your Honor, we would like to offer by stipulation the contents of certain radio broadcasts that appeared on Radio Station KALO in Little Rock and Radio Station KAAY; and we would like to have those identified as plaintiff's and defendant's Exhibit 1; there will be three items; and we would like to admit them after the close of the case today so we can give the original copies back to the radio stations.

(Thereupon, the documents above referred to were marked plaintiff's and defendant's Exhibit 1, for identification.)

The Court: You have some arrangements whereby you'll copy the portions of their files that you wish to use and submit them after the Court adjourns?

Mr. Walker: Yes, your Honor.

The Court: All right.

(Thereupon, the documents heretofore marked Plaintiff's & Defendant's Exhibits 1, for identification, were received in evidence.)

The Court: Now, do you need these radio people for anything else? I notice there seem to be several of them in the Courtroom.

Mr. Walker: Your Honor, I would like to have a photo copy made and we will do that during the recess.

The Court: Let's take care of that right now and get them away from here, not that they are required to leave, but I imagine they want to go. Court will be in recess ten minutes.

(Short recess.)

The Court: Are you ready, Gentlemen?

Mr. Walker: Your Honor, the originals have been handed to the Clerk's office so duplications can be made and they will be entered into the record for the parties.

The Court: All right.

Mr. Walker: With regard to Lake Nixon we are now prepared to introduce one. We need not put the others in because they are all more or less similar.

The Court: All right.

Mr. Walker: I would like to read it to the Court. Judge Robinson advises it might be helpful to the Court.

The Court: If you like, just hand it to me and I will read it myself.

Mr. Walker: All right, Your Honor.

(Document passed to the Court.)

The Court: All right, now, what else do you have with respect to Lake Nixon?

Mr. Walker: Mrs. Doris Daniel.

MRS. DORIS DANIEL,

called as a witness by and on behalf of Plaintiff, being duly sworn, was examined and testified as follows:

Direct Examination

Questions by Mr. Walker:

Q. Will you state your name, your address and your occupation, please?

A. I am Mrs. Doris Daniel, 1204 Ringo, I am employed as secretary for Attorney Christopher C. Mercer, Jr.

Q. What is your race?

A. I am a Negro.

Q. Will you state to the Court what happened when you went out to the Lake Nixon Club on or about July 10, 1966?

A. Well, we approached the window where we saw the people were being admitted, and the young man, we happened to be at a window and a young man said may I help you; and we said we would like to come in; and this man said we would have to wait on the lady in the next room; and we told her that we would like to come in and she asked if we were members; and we stated we weren't; she said we would have to be members to come in; and we

asked to get application to apply for membership and she said I'm sorry, but we're filled up and not accepting any more memberships; and we said thank you, and left.

Mr. Walker: No more questions.

Cross Examination

Q. Where do you live?

A. 1204 Ringo.

Q. Here in Little Rock?

A. Yes, sir.

Q. How long have you lived in Little Rock?

A. About seven years.

Q. Seven years?

A. Yes, sir.

Q. Will you speak a little louder, please; I'm kinda-hard of hearing? Where is Lake Nixon?

A. I would estimate about ten or twelve miles out 12th street, it might be more than that, or less, I knew it is out 12th street, West.

Q. Out 12th Street?

A. Yes.

Q. Had you ever been there before?

A. Before the day I went out there?

Q. Yes.

A. No.

Q. Why did you go out there?

A. I had heard advertising on the radio and I heard some people talking about it, and I just went out to look it over and perhaps participate in some of the activities.

Q. That was just on your own initiative?

A. Yes.

Q. You just decided to go out and did you go out to go in swimming?

A. Sir?

Q. Did you go out to go in swimming?

A. Perhaps to swim, but I had heard about the miniature golf and I like to play miniature golf, and we just wanted to look it over.

Q. You hadn't made any prearrangements with anybody about going out there?

A. No.

Q. You just thought it up yourself?

A. Well, Roselyn and I decided to go out there.

Q. Your girl friend and yourself?

A. Yes.

Q. Just the two of you went out there?

A. No, we were accompanied by a young man.

Q. Whose car did you go in?

A. We were in his car.

Q. Had he ever been out there before?

A. Not as I know of.

Q. Did you have a swim suit?

A. I had mine, yes.

Q. You had a swim suit with you?

A. Yes, sir.

Q. I'm sorry, but I didn't get your address?

A. 1204 Ringo.

Q. 1204 Ringo?

A. Yes.

Q. Here in the City of Little Rock; do you go in swimming often?

A. Not very often.

Q. When is the last time you went swimming?

A. I think it was July 4th, I think it was a holiday.

Mr. Robinson: That is all.

Mr. Walker: No more questions.

The Court: You may stand aside.

(Above witness temporarily excused.)

Mr. Walker: That is all we have, Your Honor.

The Court: Judge Robinson, do you have any rebuttal.

Mr. Robinson: Your Honor, I move for a directed verdict for the defendant on the evidence adduced here.

The Court: What you're suggesting then is that the Plaintiff has not made a case which would entitle, or the plaintiffs have not made cases which would entitle them to relief. This may or may not be true; I'm not prepared to pass on it at the moment, so I believe I'll reserve ruling on your motion for judgment for the defendant and the case will proceed. If you have any evidence to offer the Court will hear it. If you choose to rest with the plaintiff, of course, the case will be submitted on the record as it now stands.

Mr. Robinson: May it please the Court, may I have a few minutes to consider that?

The Court: You may.

(Brief conference between counsel and defendant.)

Mr. Walker: I want to call to the Court's attention that there are certain stipulations that we have prepared to present into the record subsequent to—

The Court: I understand that, of course, about these figures you are going to supply. You're going to supply certain figures and then you'll still have to furnish physically certain of the ad copy. Subject to the receipt of those the plaintiff's case is closed.

Mr. Gilbert: I think you ought to let the record show that without objection Mrs. Euell Paul, Jr., is a party defendant in 149.

The Reporter: I have that already, Your Honor.
The Court: Very well.
Judge Robinson: Call Mrs. Oneta Paul.

MRS. ONETA IRENE PAUL,

called as a witness by and on behalf of defendant, being duly sworn, was examined and testified as follows:

Direct Examination

Questions by Judge Robinson:

Q. State your name to the Court?
A. Oneta Irene Paul.
Q. Where do you live, Mrs. Paul?
A. Lake Nixon, Route 1, Box 77-A, Little Rock.
Q. Is that the place called Lake Nixon?
A. Yes, it is.
Q. Who owns that property, Mrs. Paul?
A. My husband and I.
Q. When did you acquire that property?
A. September 27th will be four years ago, that will be '62.
Q. '62; how much land is involved in that property out there?
A. Approximately 232 acres.
Q. Now, is there a lake on the property called Lake Nixon?
A. Yes, there is.
Q. You and your husband live there close to that?
A. We do.
Q. You have your home there?
A. Yes, we do.

Q. What did you pay for that property?

A. One hundred thousand dollars.

Q. Have you spent anything by way of improvements since you acquired it?

A. Yes, on the lake.

Q. Now, what do you have out there, Mrs. Paul, by way of facilities for the people that come out there; do you operate it as a club?

A. Yes, we do, we operate it as a club.

Q. Now, at the time that you put this on a club basis did you do it for the purpose of excluding Negroes?

A. Well, no, because there had never been any out there; it was five miles to the closest Negro addition; and it was really the last thing on our mind at the time; we had to do it to eliminate undesirables.

Q. You made a club out of it for the purpose of keeping out—as a matter of fact, undesirable white people?

A. Yes, we have.

Q. Do you take advantage of that arrangement that you have, the club arrangement, to keep out undesirable white people?

A. I don't follow you.

Q. To keep undesirable white people from entering the place?

A. We do, we have.

Q. Then you also use that reason as excluding the Negroes.

A. Right.

Q. Mrs. Paul, how many people do you have out there during the summer; when did you open the facility?

A. The facility is opened between the 5th, the middle or last of May. It is all based on the weather and the rain and—

Q. How many people would you say you have out there?

A. I couldn't give you an exact figure, because we have so many out there, but I would approximately say around a hundred thousand people come and go.

Q. Are these pictures of the place out there?

A. Yes.

(Documents passed to opposing counsel.)

Mr. Walker: No objection.

Judge Robinson: We would like to introduce this batch of pictures as Defendant's Exhibit 1.

(Thereupon, the documents above referred to were marked as Defendant's Exhibit No. 1, for identification.)

The Court: Let them be received as a group. Do you have an envelope we can put them in, and if you will just mark the envelope Defendant's Exhibit 1, and I will put them all in it.

(Thereupon, the documents heretofore marked as Defendant's Exhibit No. 1, for identification, were received in evidence.)

Q. I believe there has been some evidence introduced of the ads you had over the radio, were those ads addressed to members of the club?

A. Members of Lake Nixon.

Q. To members of Lake Nixon?

A. To all members of Lake Nixon it usually ran.

Q. Do you know the plaintiffs in this case?

A. I'm afraid not.

Q. You don't know whether they applied for admission or not?

A. Well, I don't recognize them.

Q. You know that two or three Negroes did apply for admission?

A. Three, yes; the man is the one that asked for membership cards, not the lady.

Q. And you denied them admission?

A. Yes, I did.

Q. You denied them admission because they are Negroes?

A. Yes, I did.

Q. Do you think you could operate that business out there as an integrated—

A. No, we could not.

Q. And I believe you say that you've got over a hundred thousand dollars invested in it?

A. Yes, now, way over.

Judge Robinson: I believe that's all.

Cross Examination

Questions by Mr. Walker:

Q. Mrs. Paul, when did you start operating Lake Nixon as a public facility?

A. As a public facility, what—

Q. Was it in operation during 1964?

A. Yes, it has been operated since we bought it.

Q. When was that?

A. September 27th will be four seasons, will that be '62?

Q. So you have operated it—

A. Four years, four seasons.

Q. You've operated it from '62 to '64 just for white persons?

A. No; we've operated all these years since we've had it just for white people.

Q: I see; what I'm trying to establish, from 1962, at the time you got it, to 1964 it was not a private club?

A. They did not have to have a membership card, no.

Q. And after 1964 you changed it into a private club?

A. Membership, yes.

Q. Membership only?

A. Yes.

Q. Now, between 1962 and 1964 did you have the right to exclude anybody you wanted to?

A. We certainly did.

Q. What right do you have now?

A. It is our property, we live there.

Q. What right do you have to exclude anybody now that you did not have in 1963 or '62, when you bought it?

A. We had a right then; we figured it was our property, we pay the tax on it.

Q. And you still figure that, don't you?

A. Yes, we live there.

Mr. Walker: No more questions.

Redirect Examination

Questions by Judge Robinson:

Q. We have a map of Pulaski County, does that red mark indicate the location of Lake Nixon?

A. Yes, it does.

Judge Robinson: By stipulation, may it please the Court, I would like to introduce this map in evidence.

(Thereupon, the document above referred to was marked as Defendant's Exhibit No. 2, for identification.)

The Court: Allright; that will be defendant's Exhibit No. 2?

Judge Robinson: Defendant's Exhibit 2. Would the Court like to see it?

The Court: Yes, I would like to see it.

(Document passed to the Court.)

The Court: The little red mark there indicates the location.

(Thereupon, the document heretofore marked as Defendant's Exhibit No. 2, for identification, was received in evidence.)

Judge Robinson: I believe that is all.

The Court: Anything further?

Mr. Walker: No, Your Honor.

The Court: You may stand aside.

(Above witness temporarily excused.)

Judge Robinson: That is the Defendant Paul's case, Your Honor.

The Court: Any rebuttal?

Mr. Walker: No, Your Honor.

The Court: Then, your record will be closed in 149 upon receipt of the figures that you Gentlemen have agreed were to be filed later, and the materials from the radio stations.

Mr. Walker: May it please the Court, we have introduced all that we want.

The Court: You think then one ad is sufficient?

Mr. Walker: Yes, sir, I think it will reflect the time that they were advertised.

The Court: So we will have then only certain figures from the books?

Mr. Walker: That's right, Your Honor.

The Court: Now, Gentlemen, are you ready to go to No. 150?

Memorandum Opinion

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

WESTERN DIVISION

LR-66-C-149

ROSALYN KYLES and DORIS DANIEL,

Plaintiffs,

v.

EUELL PAUL, JR., Individually and as Owner Manager or Operator of the LAKE NIXON CLUB,

Defendant.

LR-66-C-150

ROSALYN KYLES and DORIS DANIEL,

Plaintiffs,

v.

J. A. CULBERSON, Individually and as Owner, Manager or Operator of SPRING LAKE, INC.,

Defendant.

These two suits in equity, brought under the provisions of Title II of the Civil Rights Act of 1964, P.L. 88-352, §§201 et seq., 78 Stat. 243 et seq., 42 U.S.C.A., §§2000a and 2000a-1 through 2000a-6, have been consolidated for trial and have been tried to the Court without a jury. Federal jurisdiction is not questioned and is established adequately by reference to section 207 of the Act, 42 U.S.C.A., §2000a-6.

Memorandum Opinion

Plaintiffs are Negro citizens of Little Rock, Pulaski County, Arkansas. The defendants in No. 149, Mr. and Mrs. Euell Paul, Jr., own and operate a recreational facility known as Lake Nixon. The corporate defendant in No. 150, Spring Lake Club, Inc., own and operate a similar facility known as Spring Lake. All of the stock in Spring Lake Club, Inc., except one qualifying share, is owned by the defendant, J. A. Culberson, and his wife.

The two establishments are not far from each other. Both are located in Pulaski County some miles west of the City of Little Rock. In July 1966 the two plaintiffs presented themselves at both establishments and sought admission thereto. They were turned away in both instances on the representation that the establishments were "private clubs."

On July 19 plaintiffs commenced these actions on behalf of themselves and others similarly situated. The complaints allege in substance that both Lake Nixon and Spring Lake are "Public Accommodations" within the meaning of Title II of the Act, and that under the provisions of section 201(a) they, and others similarly situated, are "entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations (of the facilities) without discrimination or segregation on the ground of race, color, religion, or national origin." They pray for appropriate injunctive relief as provided by section 201 of the Act.

In their answers the defendants[1] deny that Lake Nixon

[1] Originally, the suits were brought against Mr. Paul and Mr. Culberson only. At the commencement of the trial Mrs. Paul and Springs Lake Club, Inc., were made parties defendant without objection, and they have adopted, respectively, the answers of Mr. Paul and Mr. Culberson.

and Spring Lake are public accommodations within the meaning of the Act; affirmatively, they plead that the two facilities are "private clubs" and are exempt from the Act by virtue of section 201(a), even if initial coverage exists.

Sections 201(a) and 201(b) of the Act prohibit racial discrimination in certain types of public accommodations if their operations "affect" interstate commerce, or if racial discrimination or segregation in their operation is "supported by State action."

Section 201(b) makes the prohibition applicable to four categories of business establishments, namely:

"(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

"(2) any restaurant, cafeteria, lunchroom, lunch counter soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

"(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

"(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment."

Section 201(c) sets forth criteria whereby it may be determined whether an establishment affects interstate commerce. That section is as follows:

"The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (1) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several states, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country."

Section 201(d) is as follows:

"Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is car-

ried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof."

The exemption invoked by defendants appears in section 201(e) which provides that the provisions of Title II of the Act do not apply to "a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section."

Federal prohibitions of racial, ethnic or religious discrimination or segregation in State and municipal facilities are based ultimately on the 14th Amendment to the Constitution of the United States. Title II of the Civil Rights Act of 1964 finds its constitutional sanction in the commerce clause of the Constitution itself. Constitution, Article 1, Section 8, Clause 3. That Title II, as written, is constitutional is now settled beyond question, at least as far as this Court is concerned at this time. Heart of Atlanta Motel v. United States, 379 U.S. 241; Katzenbach v. McClung, 379 U.S. 294; Willis v. The Pickrick Restaurant, E.D. Ga., 231 F.Supp. 396, appeal dismissed; Maddox v. Willis, 382 U.S. 18, rehearing denied, 382 U.S. 922.

The rationale of those holdings is that Congress permissibly found that racial discrimination, including racial segregation, in certain types of business establishments adversely affects interstate commerce, and acted constitutionally to prohibit such discrimination. These cases also establish that, even though practices on the part of an individual enterprise have no significant or even measurable impact on commerce, such practices by such enterprise

Rock Today," a monthly magazine indicating available attractions in the Little Rock area, and inserted one advertisement in the "Little Rock Air Force Base," a monthly newspaper published at the Little Rock Air Force Base at Jacksonville, Arkansas.

On June 4, and June 30, 1966, Spring Lake advertised Saturday night dances over Radio Station KALO; on May 26, 27, and 28 a dance was advertised over Station KAAY. Station KALO apparently leased the premises for a picnic held in July and advertised that picnic from June 6 through July 16.

In 1965 Spring Lake advertised certain dances by means of announcements over Station KALO. Two of these announcements indicated that there would be diving exhibitions during the intermissions, and one of the announcements was to the effect that in addition to the diving exhibition there would be a display of fireworks.

The record contains a sample of a brochure put out by Spring Lake; that brochure shows pictures of the facilities, describes them in some detail, refers without emphasis to "guest fees" in addition to the regular admission charge and points out that the fee of twenty-five cents is to be paid only once. Readers of the brochure are advised that the facilities may be reserved for private parties by telephoning "well in advance." The brochure also contains a map showing one how to reach Spring Lake, and the "membership cards" of Spring Lake depict a similar map.

As stated, both establishments are located some miles west of Little Rock. Both are accessible by country roads; neither is located on or near a State or federal highway. There is no evidence that either facility has ever tried to attract interstate travelers as such, and the location of the facilities is such that it would be in the highest degree un-

likely that an interstate traveler would break his trip for the purpose of utilizing either establishment. Of course, it is probably true that some out-of-state people spending time in or around Little Rock have utilized one or both facilities.

Food and soft drinks are purchased locally by both establishments. The record before the Court does not disclose where or how the local suppliers obtained the products which they sold to the establishments. The meat products sold by defendants may or may not have come from animals raised, slaughtered, and processed in Arkansas. The bread used by defendants was baked and packaged locally, but judicial notice may be taken of the fact that the principal ingredients going into the bread were produced and processed in other States. The soft drinks were bottled locally, but certain ingredients were probably obtained by the bottlers from out-of-State sources.

Turning now to the law, the Court will take up the issues in what appears to it to be a convenient, if perhaps not a strictly logical, order.

Defendants' claims of exemption as private clubs will be rejected out of hand. The Court finds it unnecessary to attempt to define the term "private club," as that term is used in section 201(a) because the Court is convinced that neither Lake Nixon nor Spring Lake would come within the terms of any rational definition of a private club which might be formulated in the context of an exception from the coverage of the Act. Both of these establishments are simply privately owned accommodations operated for profit and open in general to all of the public who are members of the white race. Cf. United States v. Northwest Louisiana Restaurant Club, W.D. La., 256 F. Supp. 151.

The Court finds without difficulty that plaintiffs were excluded from both facilities because they are Negroes. That fact was expressly admitted by Mr. Paul speaking for Lake Nixon and is inferable if not substantially admitted with respect to Spring Lake. The Court finds also that any other individual Negroes who might have applied for admission to the facilities during 1966 would have been excluded on account of their race, and that defendants will continue to exclude Negroes unless the Court determines that the facilities are covered by the Act.

This brings the Court to a consideration of the basic issue of coverage. The question is not whether Lake Nixon and Spring Lake are "public accommodations," but whether they are public accommodations falling within one or more of the four categories of establishments covered by the Act.

It is not suggested that either establishment falls within the first statutory category, and the Court is persuaded that neither falls within the fourth. In that connection the Court finds that both Lake Nixon and Spring Lake are single unit operations with the sales of food and drink being merely adjuncts to the principal business of making recreational facilities available to the public. Section 201 (b)(4) plainly contemplates at least two establishments, one of them covered by the Act, operating from the same general premises. See e.g. Pinkney v. Meloy, M.D. Fla., 241 F. Supp. 943. That situation does not exist here.

The second category set out in section 201(b)(2) consists of establishments "principally engaged" in the sale of food for consumption on the premises. Food sales are not the principal business of the establishments here involved, and the second category does not cover them. Cf.

Newman v. Piggie Park Enterprises, Inc., D.C., S.C., 256 F. Supp. 941.[4]

The third category, section 201(b)(3), includes certain specifically described places of exhibition or entertainment and also "any other place of exhibition or entertainment." It is clear that neither Lake Nixon nor Spring Lake is a motion picture house, concert hall, theatre, sports arena, or stadium. Hence, if either establishment is covered by the third category it must be on the theory that it falls within the catch-all phrase above quoted.

Determination of the scope of the catch-all phrase calls for an application of the Rule of ejusdem generis. Robertson v. Johnston, E.D. La., 248 F.Supp. 618, 622. In that case it was pointed out that "place of entertainment is not synonymous with "place of enjoyment." And in addition this Court will point out that "entertainment" and "recreation" are not synonymous or interchangeable terms.

The statutory phrase "other place of exhibition or entertainment" must refer to establishments similar to those expressly mentioned. When one considers the exhibitions and entertainment offered by motion picture houses, theatres, concert halls, sports arenas and stadiums, it is clear at once that basically patrons of such establishments are edified, entertained, thrilled, or amused in their capacity of spectators or listeners; their physical participation in what is being offered to them is either non-existent or minimal; their role is fundamentally passive.

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[4] In using the term "food sales" the Court includes sales of both food and soft drinks. That sales of drinks would not be considered as sales of "food" is indicated by Chava v. Sdrales, 10 Cir., 344 F. 2d 1019; Robertson v. Johnston, E.D. La. 249 F. Supp. 615; Tyson v. Cazes, E.D. La., 238 F. Supp. 937, rev'd on other grounds, 3 Cir. 363 F. 2d 742.

are prohibited where they are of a type which Congress has found affects commerce adversely.

In coming to the latter conclusion the Court in McClung drew an analogy between an individual business man who practices racial discrimination and an individual farmer who violates a provision of the Government farm program. It was said (pp. 300-301 of 379 U.S.):

"It goes without saying that, viewed in isolation, the values of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in commerce. But, as our late Brother Jackson said for the Court in Wickard v. Filburn, 317 U.S. 111 (1942):

"'That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution taken together with that of many others similarly situated, is far from trivial. . . .'"

The burden in these cases is upon the plaintiffs to establish, first, that the facilities in question are establishments covered by the Act and, second, that plaintiffs have been subjected to racial discrimination prohibited by the Act. On the other hand, the burden is upon the respective defendants to show that they are entitled to the private club exemption which they invoke.

There is no serious dispute as to the facts in either case.

Lake Nixon has been a place of amusement in Pulaski County for many years. Several years ago the properties were acquired and improved by Mr. and Mrs. Paul, the present owners and operators. The Spring Lake property was acquired by Mr. Culberson in the spring of 1965 and the Spring Lake Club, Inc., was organized as an ordinary

business and corporation under the general corporation laws of Arkansas on April 12 of that year.[2] Both establishments are operated for the financial profit of the owners or owner. During 1963 and 1966 Lake Nixon earned substantial profits; Mr. Culberson is not sure whether Spring Lake has earned profits; no dividends have been paid by the corporation, and Mr. Culberson has drawn no salary. He is engaged in a number of business enterprises, and Spring Lake is actually operated by hired employees of the corporation.

The facilities available at both establishments are essentially the same although those at Lake Nixon are considerably more extensive than those available at Spring Lake. Primarily, the recreation offered is of the outdoor type, such as swimming, boating, picnicking, and sun bathing. Lake Nixon also has a miniature golf course.

There is a snack bar at each establishment at which hamburgers, hot dogs, some sandwiches, soft drinks, and milk are sold to patrons during 1965 and 1966. However, the snack bar operations were purely incidental to the recreational facilities, and the income derived from the sales of food and drinks was small in comparison to the income derived from fees for the use of the recreational facilities. About the middle of August 1966 and after this suit was filed, the sale of food items at Spring Lake was discontinued entirely.

In each of the snack bars there is located a mechanical record player, commonly called a "Juke Box," which pa-

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[2] Mr. Culberson did not recall definitely whether title to the property was taken originally in his name and then transferred to the corporation or whether the former owner conveyed directly to the corporation. The matter is not material. Mr. Culberson's primary purpose in incorporating his operation was to avoid personal tort liability in case of accidental injury to a patron.

trons operate by the insertion of coins. Patrons may dance to the juke box music or may simply sit and listen to it. There is no dispute that the juke boxes were manufactured outside of Arkansas, and the same thing may be said about at least many of the records played on the machines. The machines are rented from their local owner or owners by both of the establishments here involved.

During the months in which Lake Nixon is open, a dance is held once a week on Friday or Saturday night. An attendance charge is made with respect to these dances, and there is "live music" supplied by local bands made up of young people who call themselves by such names as "The Romans," "The Pacers," or "The Gents." Although the bands are compensated for their playing, actually the musicians are little more than amateurs, and their operations do not in general extend beyond the Little Rock-North Little Rock areas; certainly, there is nothing to indicate that these young musicians move in interstate commerce.

On occasions similar dances are held at Spring Lake, but they are sporadic and care is taken not to schedule a dance at Spring Lake for the same night on which a dance is to be held at Lake Nixon.

The operators of both facilities have stated candidly that they do not want to serve Negro patrons for fear of loss of business, and they do not desire to be covered by the Act. In this connection it apears that Mr. Gulberson is willing to do just about anything in the future to avoid coverage if Spring Lake is in fact covered and nonexempt at this time.

Following the passage of the Act, Mr. and Mrs. Paul began to refer to their operation as a private club, and partons have been required, at least during 1965 and 1966, to purchase "memberships" for the nominal fee of twenty-

five cents a year or per season. These fees are in addition to regular admission charges. A similar procedure has been following at Spring Lake which was not organized until after the passage of the Act. At Lake Nixon "memberships" to the "club" are sold by either Mr. or Mrs. Paul; at Spring Lake "memberships" are sold by whatever employee or employees happen to be in charge of the operation at the time.

The Court finds that neither facility has any membership committee; there is no limit on the number of members of either "club," [3] no real selectivity is practiced in the selection of members, although at each establishment the management reserves the right to refuse to adult undesirables; there are no membership lists. The Pauls do not know how many people are "members" of the Lake Nixon Club; Mr. Culberson estimates that Spring Lake, the smaller of the operations, has about 4,000 "members." Subject to a few more or less accidental exceptions at Spring Lake, Negroes are not admitted to "membership" in either "club." White applicants for membership are admitted as a matter of routine unless there is a personal objection to an individual white person making use of the facilities.

The record reflects that during 1965 and 1966 Lake Nixon has used the facilities of Radio Station KALO to advertise its weekly dances; the announcements were made on Wednesday, Thursdays, and Fridays of each week from the last of May through September 7. During the same period Lake Nixon inserted one advertisement in "Little

[3] When plaintiffs applied for admission to Lake Nixon and asked about joining the "club," they were told that the membership was full; the Pauls now admit that such statement was false in that there has never been and is not now any limit to the "membership" of the "club".

The difference in what is offered by the establishments named in section 201(b)(3) and what is offered at Lake Nixon and Spring Lake is obvious. The latter establishments do not offer "entertainment" in the sense in which the Court is convinced that Congress used the word; what they offer primarily are facilities for recreation whereby their patrons can enjoy and amuse themselves.

In adopting section 201(b)(3) Congress must have been aware that "entertainment" and "recreation" are not synonymous or co-extensive, and had Congress intended to provide coverage with respect to a "place of recreation," it could have said so easily. The Court thinks that it is quite significant that neither the category in question nor any other category mentioned in section 201(b) makes any mention of swimming pools, or parks, or recreational areas, or recreational facilities. And the Court concludes that establishments like Lake Nixon and Spring Lake do not fall within section 201(b)(3) or any other category appearing in that section as it is presently drawn.

In coming to this conclusion the Court has not overlooked the dancing which has gone on at both establishments or the diving exhibitions and fireworks display at Spring Lake. These exhibitions and that display were isolated events which took place in 1965, which have not been repeated, and which Mr. Culberson says will not be repeated. They were insignificant anyway, and it appears that the diving, which was done by life savers employed by Spring Lake, was not so much for the purpose of entertaining patrons as to demonstrate to them the competency of the life saving personnel.

As to the dancing, there are two things to be said: first, the dances held at Spring Lake play no significant part in the operations of that establishment, and the part played

by the dances held regularly at Lake Nixon would seem to play a minor role in the Lake Nixon operation. Second, and more basically, it seems to the Court that dancing, whether to "live music" or to records played on a juke box, falls more within the concept of "recreation" than within the concept of "entertainment".

But, even if it be conceded to plaintiffs that the challenged establishments are "places of entertainment," the Court cannot find that under the law their operations affect interstate commerce. Certainly, the racial discrimination which the defendants have practiced has not been supported by the State of Arkansas or any of its political subdivisions.

Referring to section 201(c), the criterion which it establishes for the determination of whether a place of exhibition or entertainment "affects commerce" is whether the establishment in question customarily presents films, performances, athletic teams, exhibitions or other sources of entertainment **which move in commerce.**" (Emphasis supplied.)

The emphasized words are not without significance when read in comparison with the statutory criterion for determining whether the operations of an eating establishment affect interstate commerce. With regard to such an establishment it is sufficient if it has served or offered to serve interstate travelers or if a substantial portion of the food which it serves **has moved** in interstate commerce. There is a distinct difference between person or thing which **moves** in interstate commerce and a person or thing which simply **has moved** in interstate commerce.

As indicated, there is no evidence here and no reason to believe that the local musicians who play for the dances at Lake Nixon and Spring Lake have ever moved as musicians in interstate commerce or that they are now doing so. Nor do the juke boxes, the records and other recrea-

tional apparatus, such as boats, utilized at the respective establishments "move" in interstate commerce, although it is true that the juke boxes, some of their records, and part of the other recreational equipment and apparatus were brought into Arkansas from without the State.

The Court's approach to and its solution of the problems presented by these cases find full support in the opinion of Judge West in Miller v. Amusement Enterprises, Inc., E.D. La., 239 F.Supp. 323, a case involving a privately owned amusement park in Baton Rouge, Louisiana.[5]

From what has been said it follows that a decree will be entered dismissing the complaints in the respective cases.

Dated this 1st day of February, 1967.

s/ J. SMITH HENLEY
United States District Judge

[5] That case was decided on September 13, 1966, and the opinion was published on December 12 of that year after the instant cases were tried.

Decree

These two cases having been consolidated for purposes of trial and having been tried together, and the Court being well and sufficiently advised, and having filed herein its opinion incorporating its findings of fact and conclusions of Law in both cases,

It is by the Court Considered, Ordered, Adjudged, and Decreed that plaintiffs in said cases take nothing by their complaints, and that both of said complaints be, and they hereby are, dismissed with prejudice and at the cost of plaintiffs.

Dated this 1st day of February, 1967.

s/ J. Smith Henley
United States District Judge

Stipulation

It is hereby stipulated between counsel for Lake Nixon and for the plaintiffs that Lake Nixon had a gross income of $10,468.95 from food sales during the 1966 season. Of this amount, purchases of food amounted to $5,550.87; payroll, insurance and depreciation amounted to $3,478.46; and food insurance amounted to $27.00. The net profit from food and concession sales amounted to $1,412.62.

Notice of Appeal

Please take notice that plaintiffs in the above-styled case hereby appeals from the decision and decree of the United States District Court for the Eastern District of Arkansas, Western Division, entered in this cause by the Honorable J. Smith Henley, District Judge, on February 1, 1967.

Opinion

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,824

MRS. DORIS DANIEL and MRS. ROSALYN KYLES,

Appellants,

v.

EUELL PAUL, JR., Individually and as Owner, Operator or Manager of LAKE NIXON CLUB,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

[May 3, 1968.]

Before VAN OOSTERHOUT, Chief Judge; MEHAFFY and HEANEY, Circuit Judges.

MEHAFFY, Circuit Judge.

Doris Daniel and Rosalyn Kyles, plaintiffs-appellants, Negro citizens and residents of Little Rock, Pulaski County, Arkansas, were refused admission to the Lake Nixon Club, a recreational facility located in a rural area of Pulaski County and owned and operated by the defendant-appellee Euell Paul, Jr. and his wife, Oneta Irene Paul. Plaintiffs

brought this suit seeking injunctive relief from an alleged discriminatory policy followed by defendant denying Negroes the use and enjoyment of the services and facilities of the Lake Nixon Club.[1] This suit was brought as a class action under Title II of the Civil Rights Act of 1964, P.L. 88-352, §§201 *et seq.*, 78 Stat. 243 *et seq.*, 42 U.S.C. §§ 2000a *et seq.*, alleging that the Lake Nixon Club is a "public accommodation" as the term is defined in the Act, and that, therefore, it is subject to the Act's provisions.

For the purpose of trial this case was consolidated with a similar suit brought by plaintiffs against Spring Lake Club, Inc. The trial was to Chief District Judge Henley who held that neither Lake Nixon Club nor Spring Lake, Inc. was a "public accommodation" as defined in and covered by Title II of the Civil Rights Act of 1964, and ordered dismissal of the complaints. We are concerned solely with the court's decision with regard to Lake Nixon Club, since there was no appeal from the portion of the decision regarding Spring Lake, Inc. Chief Judge Henley's memorandum opinion is published at 263 F.Supp. 412. We affirm.

The plaintiffs alleged in their complaint that the Lake Nixon Club is a place of public accommodation within the meaning of 42 U.S.C. §§2000a *et seq.*; that it serves and offers to serve interstate travelers; that a substantial portion of the food and other items which it serves and uses moves in interstate commerce; that its operations affect travel, trade, commerce, transportation, or communication among, between and through the several states and the District of Columbia; that the Lake Nixon Club is oper-

[1] At the trial, an oral amendment was made and accepted making Mrs. Paul a party to the action.

ated under the guise of being a private club solely for the purpose of being able to exclude plaintiffs and all other Negro persons; and that the jurisdiction of the court is invoked to secure protection of plaintiffs' civil rights and to redress them for the deprivation of rights, privileges, and immunities secured by the Fourteenth Amendment to the Constitution of the United States, Section 1; the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States; 42 U.S.C. §1981, providing for the equal rights of citizens and all persons within the jurisdiction of the United States; and Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. §§ 2000a *et seq.*, under which they allege that they are entitled to an injunction restraining defendant from denying them and others similarly situated admission to and full use and enjoyment of the "goods, services, facilities, privileges, advantages, and accommodations" of the Lake Nixon Club.

The defendant denied that Lake Nixon is a place of public accommodation within the meaning of the Act; denied that Lake Nixon serves or offers to serve interstate travelers or that a substantial portion of the food and other items which it serves and uses moves in interstate commerce; denied that its operations affect travel, trade, commerce, transportation or communication between and through the several states and the District of Columbia within the meaning of the Act; and, further answering, averred that defendant operates Lake Nixon Club as a place to swim; that he has a large amount of money invested in the facility; that if he is compelled to admit Negroes to the lake, he will lose the business of white people and will be compelled to close his business; that the value of his property will be destroyed; and that he will

be deprived of his rights under the Fourteenth Amendment to the Constitution of the United States.

The provisions of the Civil Rights Act of 1964 which define "a place of public accommodation" as covered by the Act, and which plaintiffs contend bring the Lake Nixon Club within its coverage, are contained in 42 U.S.C. § 2000a (b), and provide as follows:

> "(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter *if its operations affect commerce,* or if discrimination or segregation by it is supported by State action:
>
> "(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
>
> "(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> "(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
>
> "(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which

holds itself out as serving patrons of such covered establishment." (Emphasis added.)

It will be noted that an establishment falling in any of the four categories outlined above is covered by the Act only "if discrimination or segregation by it is supported by State action," which is not contended here, or "if its operations affect commerce." The criteria for determining whether an establishment affects commerce within the meaning of the Act are set forth in 42 U.S.C. § 2000a (c), as follows:

"(c) The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents, films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any

territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

The facts in the case are relatively simple and not in material dispute. The Lake Nixon property, consisting of 232 acres, is located on a country road several miles from the City of Little Rock and is not close to any state or federal highway. In 1962 Paul and his wife purchased this property, and since that time they have made their home there and operated the facility for recreational purposes. In 1964 they adopted a club plan in order to prevent undesirables from using the facility, with no thought of simply excluding Negroes, as no Negro had ever sought admission.[2] A membership fee of 25¢ per person per season was charged. The only Negroes who ever sought admission were the two plaintiffs and a young Negro man who accompanied them to Lake Nixon on July 10, 1966. When they sought to use the facilities, Mrs. Paul told them that the membership was filled, but candidly testified at the trial that their admission was denied because of their race. In response to written interrogatories propounded to Mr. Paul in a discovery deposition, he replied

[2] In this regard, Mrs. Paul testified as follows:

"Q. Now, what do you have out there, Mrs. Paul, by way of facilities for the people that come out there; do you operate it as a club?

"A. Yes, we do, we operate it as a club.

"Q. Now, at the time you put this on a club basis did you do it for the purpose of excluding Negroes?

"A. Well, no, because there had never been any out there; it was five miles to the closest Negro addition; and it was really the last thing on our mind at the time; we had to do it to eliminate the undesirables."

that he and his wife exercised their own judgment in accepting applicants for membership and refused those whom they did not want. Referring to the plaintiffs, Mr. Paul stated:

> "At that time, we refused admission to them because white people in our community would not patronize us if we admitted Negroes to the swimming pool. Our business would be ruined and we have our entire life savings in it."

Mr. and Mrs. Paul invested $100,000.00 in the property, and, although it is operated only during the swimming season—from some time in May until early September depending upon the weather—it has earned a substantial and comfortable livelihood for them, producing net profits in excess of $17,000.00 annually.

Plaintiff Mrs. Doris Daniel, who lived in Little Rock some twelve miles from Lake Nixon, was the only witness who testified on behalf of the plaintiffs. The other evidence is incorporated in pretrial answers to interrogatories and the testimony of Mr. and Mrs. Paul. Mrs. Daniel testified that she was employed as a secretary for Christopher C. Mercer, Jr. She further testified that she went to Lake Nixon Club on about July 10, 1966, accompanied by a girl friend, Rosalyn Kyles, the other plaintiff, and a male acquaintance. She told the attendant at the admission window that they would like to come in but was advised that they would have to wait and see the lady in the next room. Mrs. Paul was the lady to whom they were referred, and Mrs. Daniel testified that "she asked if we were members; and we stated we weren't; she said we would have to be members to come in; and we asked to

get application to apply for membership and she said I'm sorry, but we're filled up." This witness had never been to Lake Nixon before and testified that she had heard the advertising on the radio and people talking about it and went out to look it over, and perhaps participate in some of the activities. She took her swimming suit with her.

While the principal attraction at Lake Nixon is swimming, the facility also had, at the time of the trial of this case, fifteen aluminum paddle boats available for rent, two coin-operated juke boxes, and a miniature golf course. Also operated in connection with the business was a snack bar which offered for sale hamburgers, hot dogs, milk and soft drinks, but did not stock or sell coffee, tea, cigars, cigarettes, sugar or beer. On Friday nights there usually would be a dance at Lake Nixon with "live music" furnished by young musicians from the Little Rock area who were amateurs and also patrons of the facility. There is no evidence that they ever played outside this immediate locality, but to the contrary the undisputed evidence indicates that they did not.[3]

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[3] Mr. Paul testified on cross-examination as follows:

"Q. Now, did you have bands out at your place on the week ends?

"A. Yes.

"Q. Were they local bands?

"A. Yes.

"Q. Do you know whether those bands happened to play in Jacksonville?

"A. No.

"Q. You really don't know where they played, do you?

"A. Yes, I'm pretty certain they played just right here in Little Rock.

"Q. Just for you; what band was it?

"A. Well, we had the Romans, the Loved Ones. I can't remember the names of all—

Mr. Paul further stated in response to interrogatories that during the preceding twelve months the Lake Nixon Club had advertised only twice in a paper or magazine—one time in May in a local monthly magazine entitled "Little Rock Today," and one time in June in a monthly paper published at the Little Rock Air Force Base. Announcements of the dances were also made on a local radio station, inviting members of the club to attend.[4]

The food business at Lake Nixon was minimal. According to the stipulation of the parties, the net income from food and concession sales was only $1,412.62 for the entire 1966 season. There were an estimated 100,000 admissions to Lake Nixon during the season and the food sold there was a minor and insignificant part of the business. The

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"Q. You had a lot of different bands?
"A. Yes.
"Q. How can you be sure that they just played in Little Rock?
"A. Because they were members there and were frequently out there; they mostly worked in town and this was a hobby; they were not professionals."

[4] Mr. Paul testified as follows:

"Q. Did you advertise for persons to come and make use of the facilities during the summer?
"A. Members only.

"A. Our opening statement was basically, well specifically stated that it was for members only.
"Q. For members only?
"A. Yes.

Mrs. Paul testified as follows:

"Q. I believe there has been some evidence introduced of the ads you had over the radio, were those ads addressed to members of the club?
"A. Members of Lake Nixon.
"Q. To members of Lake Nixon?
"A. To all members of Lake Nixon it usually ran."

testimony was that the club was not in the food business but merely had the snack bar as a necessary adjunct to serve those who wished to refresh themselves during an afternoon or evening of participation in the various forms of recreation offered—swimming, boating, miniature golfing, or dancing.[5]

The district court found that Lake Nixon was not a private club but was simply a privately owned accommodation operated for profit and open in general to all members of the white race. The court further found that the defendants were excluded on account of their race but that the Lake Nixon Club did not fall within any of the four categories designated by Congress as "public accommodations" which affect commerce within the meaning of the Civil Rights Act of 1964, and, therefore, the Club was not subject to its provisions. We agree with the court's conclusion.

Plaintiffs do not contend that Lake Nixon falls within the first category pertaining to inns, hotels, motels, etc: They do, however, contend that the three remaining categories bring it within the Act.

As hereinbefore pointed out, the second category includes "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises," if its operations affect commerce, but not otherwise. In deter-

[5] Mr. Paul testified on cross-examination as follows:

"Q. But sales from sandwiches and the like did account for a large degree of your gross sales; is that true?

"A. No, very minor what we make off of that; food was just a commodity to have there for the people if they wanted it; I mean we were not in the food business—there was no restaurant— it was just a necessity."

mining whether its operations affect commerce, we must look to U.S.C. § 2000a (c), which provides that the operations of an establishment affect commerce within the meaning of this subchapter in the case of an establishment described in paragraph (2) of subsection (b), if it "serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce."

The trial court found that there was no evidence that the Lake Nixon Club has ever tried to attract interstate travelers as such, and that the location of the facility is such that it would be of the highest degree unlikely that an interstate traveler would break his trip for the purpose of utilizing its facilities, it being located on a country road remote from either a federal or a state highway. With regard to the food served, the trial court reasoned that since the second category consists of establishments "principally engaged" in the sale of food for consumption on the premises and since food sales are not the principal business of the Lake Nixon Club, it would not be included in the second category. In this connection, the court held that the Lake Nixon Club was a single utilized operation, with the sale of food and drink being merely adjuncts to the principal business of making recreational facilities available to the public, and that, therefore, it would not come within the fourth category making the Act applicable to an establishment otherwise covered or within the premises of which is physically located any such covered establishment.

With regard to whether a substantial portion of the food which Lake Nixon serves has moved in commerce, the trial court found that food and soft drinks were purchased

locally by the Club but noted that the record before the court did not disclose where or how the local suppliers obtained the products. The court further observed that the meat products sold by the defendants may or may not have come from animals raised, slaughtered, and processed in Arkansas. It also made an observation that the bread used in the sandwiches was baked and packaged locally but took judicial notice that the principal ingredients going into the bread were produced and processed in other states. This observation on the part of the court, however, was entirely voluntary, and the ingredients in the bread would not constitute a substantial part of the food served. We might add that it is a matter of common knowledge that Borden's of Arkansas, which the record shows supplied the milk, obtains the unprocessed milk for its local plant from Arkansas dairy farmers.

Looking to the legislative history of the Civil Rights Act for an indication regarding what the proponents of the bill intended by the use of the word "substantial" in § 2000a (c), we note that Robert F. Kennedy, who was then Attorney General, expressed the opinion in the hearings on S. 1732 before the Senate Committee on Commerce that the word "substantial" means "more than minimal." *Codogan* v. *Fox*, 266 F.Supp. 866, 868 (M.D. Fla. 1967). In *Newman* v. *Piggie Park Enterprises, Inc.*, 256 F.Supp. 941 (D. S.C. 1966), rev'd on other grounds, 377 F.2d 433 (4th Cir. 1967), cert. granted, 88 S.Ct. 87, the court held that where the evidence showed that at least 40% of the food moved in commerce, this was a "substantial" portion under a construction of the word in its usual and customary meaning, which the court defined as follows: "something of real worth and importance; of considerable value; valuable; something worthwhile as distinguished from

something without value or merely nominal." In the *Newman* case, the district court held that the five drive-in restaurants belonging to Piggie Park Enterprises, Inc., all of which were located on or near interstate highways, were not covered by the Act because the evidence showed that less than 50% of the food was eaten on the premises, but the Fourth Circuit Court of Appeals reversed, holding that the test in construing this provision of the Act was not whether a principal portion of the food was actually consumed on the premises but whether the establishment was principally engaged in the business of selling food ready for consumption on the premises.

In *Willis* v. *Pickrick Restaurant*, 231 F.Supp. 396 (N.D. Ga. 1964), where the restaurant had annual gross receipts from its operations of over $500,000.00 for the preceding year and its purchases of food exceeded $250,000.00, the court found that a substantial part of this large amount of food originated from without the state and that, therefore, it affected commerce. Furthermore, while there was little evidence that it actually served interstate travelers, the evidence was clear that it offered to serve them by reason of the fact that it had large signs on two federal highways, and the restaurant itself was on the main business route of U. S. 41, a federal interstate highway.

In *Gregory* v. *Meyer*, 376 F.2d 509 (5th Cir. 1967), the court held that the question of the amount of food served in a restaurant which has moved in interstate commerce is a relative one and that the drive-in there involved, which had an annual sales of about $71,000.00, of which approximately $5,000.00 resulted from the sale of coffee and tea which had moved in interstate commerce, and which derived two-thirds of its sales volume from beef products

which came from a meat packer who purchased twenty to thirty per cent of his cattle from another state, was covered by the Act. Furthermore, the drive-in in the *Gregory* case was located only three blocks from a federal highway, on a street which was an extension of the highway, and the court found that it was engaged in offering to serve interstate travelers.

The case of *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), is likewise distinguishable. The Supreme Court there stated at page 298: "In this case we consider its [the Act's] application to restaurants which serve food a substantial portion of which has moved in commerce." The restaurant there was located on a state highway, eleven blocks from an interstate highway, and evidence was introduced that 46% of the food served was meat which had been procured from outside the state.

The case of *Evans* v. *Laurel Links, Inc.*, 261 F.Supp. 474 (E.D. Va. 1966), cited by plaintiffs, is likewise factually inapposite. In the *Evans* case, it was stipulated that a portion of the food served moved in interstate commerce and that each year out-of-state teams participated in team matches; further, that the golf shop sold golf equipment, most of which was manufactured outside the state and had moved in interstate commerce. The court found that the lunch counters at Laurel Links served and offered to serve interstate travelers and also that the defendant customarily presented athletic teams which moved in commerce, thereby bringing it under subsection (b), paragraph (3) and subsection (c) of 42 U.S.C. § 2000a. The court there said at page 477: "The Act applies because an out-of-state team plays on the defendant's course on a regularly scheduled annual basis.".

In the record before us, there is a total lack of proof that Lake Nixon Club served or offered to serve interstate travelers or that a substantial portion of the food which it served moved in interstate commerce. Therefore, all of the cases cited by the parties are distinguishable inasmuch as there is not a word of record testimony here that would justify a conclusion that the concession stand engaged in or offered to engage in any business affecting commerce. The same can be said with respect to the recreational facilities at Lake Nixon. There is not one shred of evidence that Lake Nixon customarily presented any activity or source of entertainment that moved in interstate commerce.

The evidence here is that Lake Nixon is a place for swimming and relaxing. While swimming is the principal activity, it does have fifteen aluminum paddle boats which are leased from an Oklahoma-based company and a few surf boards. It is common knowledge that annually thousands of this type boat are manufactured locally in Arkansas, and there is no evidence whatsoever that any of the equipment moved in interstate commerce. Furthermore, we do not interpret the law to be that coverage under the Act extends to businesses because they get a portion of their fixtures and/or equipment from another state. Otherwise, the businesses which the Act's sponsors and the Attorney General of the United States specifically said were not covered would be included in the coverage.[6] There were two juke boxes obtained from a local amusement company which provided music upon the insertion of a coin. As hereinbefore stated, there usually would be a dance on Friday nights if the weather was good, and the

[6] Senator Magnuson, floor manager of Title II, said that dance studios, bowling alleys and billiard parlors would be exempt, 110 Cong. Rec. 7406 (4/9/64); *Miller* v. *Amusement Enterprises, Inc.*, ... F.2d ..... (5th Cir. # 24259 9/6/67).

dances were sometimes advertised on a local radio station, apprising the members concerning the dance and inviting them to attend.

When the juke boxes were not utilized at the Friday night dances, a small band was provided but it was composed of local young amateurs and members of the Club, and there is no evidence whatsoever that they ever played outside Pulaski County. Such operations do not affect commerce under the definition of the statute which makes coverage applicable if the operation "customarily presents films, performances, athletic teams, exhibitions or other sources of entertainment which move in commerce." It was clearly not the intention of the Congress to include this type of recreation within the coverage of the Act, but, even if it should be construed as entertainment within the definition of the Act, it did not move in commerce and consequently is not proscribed.

The Civil Rights Act of 1964, as everyone knows, is a compromise act. It was not intended to be all inclusive, and, in this regard Senator Humphrey, a leading proponent of the bill, stated:

> "The reach of that title [H.R. 7152] is much narrower than when the bill was first introduced. It is also narrower than S. 1732, the bill reported by the Senate Commerce Committee, which covers the general run of retail establishments. . . . The deletion of the coverage of retail establishments generally is illustrative of the moderate nature of this bill and of its intent to deal only with the problems which urgently require solution." 110 Cong. Rec. 6533.[7]

[7] This extract is taken from the legislative history furnished the Fifth Circuit by the Civil Rights Division of the Department of Justice and attached to the opinion in *Miller* v. *Amusement Enterprises, Inc., supra.*

Additionally, Senator Humphrey stated:

> "Of course, there are discriminatory practices not reached by H. R. 7152, but it is to be expected and hoped that they will largely disappear as the result of voluntary action taken in the salutory atmosphere created by enactment of the bill." 110 Cong. Rec. 6567.[8]

Senator Magnuson, who was floor manager of Title II, discussed this title in detail and said:

> "The types of establishments covered are clearly and explicitly described in the four numbered subparagraphs of section 201 (b). An establishment should have little difficulty in determining whether it falls in one of these categories. . . . Similarly, places of exhibition and entertainment may be expected to know whether customarily it (sic) presents sources of entertainment which move in commerce." 110 Cong. Rec. 6534.[9]

A section-by-section analysis of S. 1732 appears in 2 U. S. Cong. & Adm. News '64 at pages 2356 *et seq.* In a paragraph concerning subsection 3 (a) (2), it was stated:

> "This subsection would include all public places of amusement or entertainment which customarily present motion pictures, performing groups, athletic teams, exhibitions, or *other sources of entertainment which move in interstate commerce.*" (Emphasis added.)

We have no disagreement with the trial court's rationale or with its utilization of the rule of *ejusdem generis* in

[8] See n. 7.

[9] See n. 7.

arriving at its conclusion, but our view is that subsection (c) of the statute so plainly defines the operations that affect commerce that it is obvious that Lake Nixon's activities are not proscribed by the Act. Plaintiffs' argument that the Act applies is based on the false premise that a "substantial portion of the food sold has traveled through interstate commerce," which is wholly unsupported by the evidence. Treating this false assumption as a fact, plaintiffs then conclude that "the operation of the snack bar affects commerce within the meaning of § 201 (c) (2) of Title II."

In *Miller v. Amusement Enterprises, Inc.*, . . . F.2d . . . (5th Cir. # 24259 9/6/67), the panel requested the United States, acting through its Civil Rights Division in the Department of Justice, to file with the court its brief setting forth the legislative history of these provisions insofar as pertinent. The response of the Civil Rights Division is attached to that opinion. The opinion by the three-judge panel in *Miller* was subsequently reversed by a divided court sitting en banc in an opinion handed down April 8, 1968. We cite the panel's slip opinion merely because it incorporates the Government's reference to the legislative history of the Act, a part of which we have heretofore referred to. The facts in the *Miller* case are patently distinguishable from those in the instant case. As examples, in *Miller* the amusement park was "located on a major artery of both intrastate and interstate transportation; . . . its advertisements solicit the business of the public generally" and were not confined to club members; and "ten of its eleven mechanical rides admittedly were purchased from sources outside Louisiana."

What clearly distinguishes the case before us from other cases filed under this statute is the total lack of any evi-

dence that the operations of Lake Nixon in any fashion affect commerce. There is no evidence that any interstate traveler ever patronized this facility, or that it offered to serve interstate travelers, or that any portion of the food sold there moved in commerce, or that there were any exhibitions or other sources of entertainment which moved in or affected commerce.

The Congress by specifically and in plain language defining the criteria for coverage under subsection (c) precludes the court from holding upon any rule of construction that interstate commerce was affected absent requisite evidence establishing the criteria spelled out in the statute. There is no such evidence in this record.

We have read all the cases cited by the parties, as well as others, and our research has failed to disclose a single case where there was a complete absence of evidence, as there is in the instant case, to establish coverage under the Act.

The judgment of the district court is affirmed.

HEANEY, Circuit Judge, dissenting:

In my view, the judgment of the District Court cannot be upheld. It is based on an erroneous theory of the law and is not supported by the facts found by the court.

The court held that the Lake Nixon Club is not a covered establishment under the Civil Rights Act of 1964, §§ 201 (b)(2) and (4), 42 U.S.C. 2000(b)(2) and (4) (1964), despite the fact that a lunch counter is operated on the premises, because the lunch counter is merely an adjunct to the business of making recreational facilities available to the public, and is not a separate establishment.

This conclusion is not supportable. Whether the lunch counter is an adjunct of or necessary to the operation of

the Club is immaterial, as is the question of whether the lunch counter is operated as a separate establishment or as a part of a coordinated whole.

Mr. Chief Justice Warren, commenting on the effect of a food facility in an amusement park in *Drews* v. *Maryland*, 381 U.S. 421, 428, n. 10 (1965),[1] stated:

> "There is a restaurant at Gwynn Oak Park; indeed, petitioners were standing next to it when they were arrested. If a substantial portion of the food served in that restaurant has moved in interstate commerce,[2] the entire amusement park is a place of public accommodation under the Act. * * * "

In *Evans* v. *Laurel Links, Inc.*, 261 F.Supp. 474 (E.D. Va. 1966), the court found that a golf course was a public accommodation within the meaning of the Act because it had a lunch counter located on it. It did this even though the lunch counter accounted for only fifteen per cent of the gross receipts of the golf course. (Lunch counter re-

[1] For reasons hereinafter stated, it is my opinion that, in this case, commerce requirements were met by a showing that the Club served and offered to serve travelers in interstate commerce, thus I do not reach the issue of whether a substantial portion of the food moved in interstate commerce.

[2] The defendant and others refused to leave an amusement park and were convicted in a Maryland State Court of disorderly conduct and disturbance of the peace. After having previously remanded the case to the State Court of Appeals, the Supreme Court dismissed a subsequent appeal and refused to grant certiorari. Mr. Chief Justice Warren, joined by Mr. Justice Douglas, dissented and would have granted certiorari. In the course of discussing the legal issues involved, the Chief Justice noted that although the 1964 Civil Rights Act was passed after the occurrence of the conduct for which the defendants were prosecuted, the Act abated the pending convictions. *Hamm* v. *Rock Hill*, 379 U.S. 306 (1964). In the course of stating that view, he made the observations quoted above.

ceipts at Lake Nixon Club were approximately 22.8% of its gross income.)[3] In *Evans*, the court said:

> "The location of the lunch counter on the premises brings the entire golf course within the Act under 42 U.S.C. § 2000a(b)(4)(A)(ii) which provides that any establishment within the premises of which is located a covered establishment is a place of public accommodation. See H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964) (additional Majority Views, Hon. Robert W. Kastenmeier) U.S. Code Cong. & Admin. News, pp. 2409, 2410 (1964); Rasor, Regulation of Public Accommodations Via the Commerce Clause—The Civil Rights Act of 1964, 19 Sw.L.J. 329, 331 (1965)."

Id. at 476.

In *Adams* v. *Fazzio Real Estate Co., Inc.*, 268 F.Supp. 630 (E.D. La. 1967), the court held that the snack bar located on the premises of the bowling alley brought the entire facility under the Act. It stated:

> "The statute contains no percentage test, and it is not necessary to show that the covered establishment which magnetizes the non-covered establishment in which it is physically located occupies a majority, or even a substantial part of the premises, or that its sales are major or even a substantial part of the revenues of the establishment. • • • "

Id, at 638 (footnote omitted).

In *Scott* v. *Young*, 12 Race Rel. L. Rep. 428 (E.D. Va. 1966), the parties consented to the entry of an order pro-

[3] In 1966, the gross income from food sales was $10,468.95, as compared with a total gross income of $46,326.

viding that as long as an eating establishment was operated on the premises of a recreational facility, the entire facility would be considered a public accommodation within the meaning of the 1964 Civil Rights Act, and that the defendant would be enjoined from denying the equal use of the facility to any person on the basis of race or color.

Furthermore, House Report 914 stated that the establishments covered under § 201(b)(4) "would include, for example, retail stores which contain public lunch counters otherwise covered by Title II;" [4] and the additional views of the minority stated that "Section 201(d) precludes racial discrimination • • • . • • • [of] a department store (operating a lunch counter) • • • ." [5]

In *Drews*,[6] *Evans*, *Adams* and *Scott*, the records indicate that the lunch counter and the recreation facility were owned by the same entity and operated as one coordinated facility.

The District Court relies on *Pinkney* v. *Meloy*, 241 F. Supp. 943 (N.D. Fla. 1965), to support its holding that a lunch counter must be a separate establishment (apparently separately owned) to evoke § 201(b)(4). There, the court held that a barber shop could not discriminate as it was located within a hotel, which was a covered establishment. The barber shop was separately owned, but that fact was not critical to the *Pinkney* decision. The legisla-

[4] House Report (Judiciary Committee) No. 914, 1964 *U. S. Code Cong. & Ad. News*, 2391, 2396.

[5] Additional Views on H.R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, Hon. James E. Bromwell, 1964 *U. S. Code Cong. & Ad. News*, 2487, 2494.

[6] *Drews* v. *State*, 224 Md. 186, 167 A.2d 341, 342 (1961).

tive history of the Act gives an example the precise fact situation involved in *Pinkney*:

> "A hotel barber shop or beauty parlor would be an integral part of the hotel, *even though* operated by some independent person or entity [Emphasis added]." [7]

The majority opinion of this Court does not base its decision on the rationale of the District Court that Lake Nixon is not a covered establishment within the meaning of §§ 201(b)(2) and (4). It relies instead on an alternative ground, namely, that even if it is otherwise covered, "There is a total lack of proof that Lake Nixon Club served or offered to serve interstate travelers or that a substantial portion of the food served moved in interstate commerce." One of these elements must, of necessity, be established to bring the Club within the Act.[8]

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[7] Senate Report (Judiciary Committee) No. 872, 1964 *U. S. Code Cong. & Ad. News*, 2355, 2358-59.

[8] It need not be established that the defendants' food "operations affect commerce" if the discriminatory practices by the defendants were "supported by state action." A state action theory of the case was not alleged nor argued.

The 1964 Civil Rights Act specifically defines "supported by state action:"

> "§ 201(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by the action of the State or political subdivision thereof."

An Arkansas statute purports to give an omnibus right to discriminate:

> "§ 71-1801. *Right to select customers, patrons or clients.*—Every person, firm or corporation engaged in any public busi-

As I read the District Court's decision, it avoided making a specific finding on whether the Club offered to serve interstate travelers. It did, however, state:

> "It is probably true that some out-of-state people spending time in or around Little Rock have utilized [Lake Nixon Club facilities]."

> ness, trade or profession of any kind whatsoever in the State of Arkansas, including, but not restricted to, * * * restaurants, dining room or lunch counters, * * *, or other places of entertainment and amusement, including public parks and swimming pools, * * *, is hereby authorized and empowered to choose or select the person or persons he or it desire to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve; * * *."

Arkansas Statutes Annotated, Vol. 6A (1967 Supp).

The statute is further supported by criminal sanctions:

> "§ 71-1803. *Failure to leave after request—Penalty.*—Any person who enters a public place of business in this State, or upon the premises thereof, and is requested or ordered to leave therefrom by the owner, manager, or any employee thereof, and, after having been so requested or ordered to leave, refuses so to do, shall be guilty of a trespass and upon conviction therefor shall be fined not more than five hundred dollars ($500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment. [Acts 1959, No. 169, § 3, p. 1007.]"

Arkansas Statutes Annotated, Vol. 6A (1967 Supp).

In view of the fact that I would reverse on other grounds, it is not necessary to express a view as to whether the plaintiff has made a prima facie case that the discrimination is supported by state action under § 201(b)(i) by simply showing that the defendant discriminated and that the statute explicitly gave him that right. *Cf., Adickes* v. *S. H. Kress & Company,* 252 F.Supp. 140 (S.D. N. Y. 1966). Furthermore, it is not necessary to express an opinion as to whether it is a defense to establish that the defendant would have discriminated regardless of the state statute. *Williams* v. *Hot Shoppes, Inc.*, 293 F.2d 835, 846-47 (D.C. Cir. 1961) (dissenting opinion), *cert. denied,* 370 U.S. 925 (1962).

This statement, in my view, constitutes a clear and specific finding that the Club served interstate travelers and was sufficient in and of itself to satisfy the interstate commerce requirement of the Act set forth in § 201(c)(2)(b).[9] Since this requirement is satisfied, the Club is covered.

While it is not necessary to find additional grounds to satisfy the commerce requirements of the Act, the record also supports the conclusion that the Club offered to serve travelers in interstate commerce: (1) the Club advertised on KALO radio on Wednesdays, Thursdays and Fridays from the last of May through the 7th of September;[10] (2) it inserted one advertisement in "Little Rock Today," a monthly magazine, indicating available attractions in

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[9] The conclusion of the District Court draws additional support from the following facts:

(1) The defendants made no attempts to specifically exclude interstate travelers:

(a) The membership card did not require that the applicant sign his address;

(b) The advertisements did not suggest that an interstate traveler could not become a member; and

(c) There is no sign posted at the entrance which restricted the membership only to Arkansas residents.

(2) Members brought guests.

(3) Lake Nixon appears to be only about six to eight miles by road from the only federal highway between Little Rock and Hot Springs.

[10] The radio copy read as follows:

"Attention . . . all members of Lake Nixon. Attention all members of Lake Nixon. In answer to your requests, Mr. Paul is happy to announce the Saturday night dance will be continued . . . this Saturday night with music by the Villagers, a great band you all know and have asked to hear again. Lake Nixon continues their policy of offering you year-round entertainment. The Villagers play for the big dance Saturday night and, of course, there's the jam session Sunday afternoon . . . also swimming, boating, and miniature golf. That's Lake Nixon. . . ."

the Little Rock area in the same period; (3) it inserted one advertisement in the "Little Rock Air Force Base," a monthly newspaper published at the Little Rock Air Force Base, at Jacksonville, Arkansas.

It is clear, as pointed out in the majority opinion, that the advertisements were directed to "members." It is thus argued that interstate travelers would not consider the invitation as having been addressed to them. I cannot agree. The membership idea was clearly a ruse to keep Negroes from using the Club. It was obviously understood to be such by the people living in the Little Rock area, and there is little reason to doubt that nonresidents would be less sophisticated. It also appears, from the choice of media, that the message was intended to reach nonresidents as well as local citizens. No other sound reason can be advanced for using mass media to promote "entertainment" at a "private" club.

The District Court rationalized that the Club was not a place of exhibition or entertainment as § 201(b)(3) was not intended to cover facilities where people came to enjoy themselves by swimming, golfing, boating or picnicking. It reasoned that the Act was only intended to apply to a situation "where patrons came to be edified, entertained, thrilled or amused in their capacity of spectators or listeners." While it is unnecessary to reach this issue here, the majority opinion reaches it, and thus I feel obliged to.

I cannot concur with the majority: (1) It is difficult to conclude that the Club was not a place of entertainment when the defendants characterized it in those terms in their radio advertisements: "Lake Nixon continues their policy of offering you year-round entertainment." Footnote 10, *supra*. See also, *Miller* v. *Amusement Enterprises*,

Inc., Civ. No. 24259 (5th Cir. April 8, 1968) (*en banc*), reversing 259 F.Supp. 523 (E.D. La. 1966). (2) It is equally difficult to conclude that the operation of the Club did not affect commerce within the meaning of § 201(c)(3), for the District Court specifically found that the juke boxes, which furnished music for dancing or listening, were manufactured outside of Arkansas, that some of the records played on them were manufactured outside of Arkansas, and that part of the other recreational equipment and apparatus (aluminum paddle boats and "Yaks"—surfboards) were brought into Arkansas from without the state. The fact that the aluminum paddle boats and the "Yaks" (surfboards) could have been manufactured in Arkansas is, in my judgment, not material when the District Court found and the record shows that they were leased and purchased [11] from an Oklahoma concern and imported into Arkansas.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[11] It appears from the record that the "Yaks" were purchased rather than leased:

"Q. Do you have any other kind of boats there?
"A. We have what we call a yak.
"Q. A yak; what's a yak?
"A. It's similar to a surfboard.
"Q. Similar to a surfboard; do you know where you purchased that?
"A. From the same company.
"Q. What company is that?
"A. Aqua Boat Company.
"Q. Who?
"A. Aqua Boat Company.
"Q. Is that a local Company?
"A. No.
"Q. Where is it?
"A. I believe they're in Oklahoma, Bartlesville."

Judgment

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,824—September Term, 1967

DORIS DANIEL and ROSALYN KYLES,

Appellants,

vs.

EUELL PAULL, JR., Individually and as Owner, Manager or Operator of the LAKE NIXON CLUB.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Judgment of the said District Court, in this cause, be, and the same is hereby, affirmed, in accordance with majority opinion of this Court this day filed herein.

May 3, 1968.

Petition for Rehearing *En Banc*

[Cover omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,824

MRS. DORIS DANIEL and MRS. ROSALYN KYLES,

Appellants,

v.

EUELL PAUL, JR., Individually and as Owner, Operator or Manager of Lake Nixon Club,

Appellee.

APPEAL FROM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS WESTERN DIVISION

Appellants respectfully urge that this appeal, decided adversely to them on May 3, 1968, by a 2-1 decision of a panel of this court (Judges Mehaffy, Van Oosterhout, Judge Heaney dissenting), be set down for rehearing *en banc* because of (1) the important of the issues involved herein and their crucial relationship to effective enforcement of Title II of the Civil Rights Act of 1964; (2) the conflict between the majority opinion and the Fifth Circuit's *en banc* decision in *Miller* v. *Amusement Enterprises, Inc.* interpreting Sections 201(b)(3) and (c)(3) of the Act; (3) the conflict between the majority opinion here and the Fifth Circuit's opinion in *Fazzio*

Real Estate Co., Inc. v. *Adams* interpreting Section 201 (b)(4) of the Act; (4) the disagreement within the panel itself on these important issues. The panel's majority interpretation of these sections of the Act, if permitted to stand, will so seriously interfere with enforcement of Title II of the Civil Rights Act of 1964 that it should be reexamined by the entire membership of this court *en banc*.

I

There can be little doubt concerning the importance of the case. It is this court's first major interpretation of Title II of the 1964 Civil Rights Act, probably the most important legislation passed by the Congress in a quarter of a century or more and the most sweeping and far-reaching piece of civil rights legislation enacted since the Reconstruction Era. The policy expressed in Title II of the Act is one "that Congress considered of the highest priority." *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402, 19 L.ed. 2d 1263, 1265 (1968).

The majority's interpretation of the sections of the Act here involved differs so markedly from that expression of Congressional policy as to require a thoroughgoing reexamination by the full court. An additional highly important reason necessitating *en banc* consideration by this court is because the decision of the majority is now in conflict with the full Fifth Circuit Court as to the interpretation of §§ 201(b)(3) and (c)(3) of the Act and with a panel of that court as to § 201(b)(4). Obviously, the full bench of this court should consider whether these conflicts shall be permitted to stand.

II

A. Appellants have consistently maintained throughout this litigation that Lake Nixon is subject to the prohibition against racial discrimination contained in the Civil Rights Act of 1964 because it is a "place of entertainment" as that term is used in § 201(b)(3) of Title II (42 U.S.C. § 2000a(b)(3)). The district judge rejected this contention based upon a distinction between "entertainment" (spectator) and "recreation" (participant) which he felt was written into the Act. *Kyles* v. *Paul*, 263 F. Supp. 412, 419-20 (E.D. Ark. 1967). The same issue was involved in the recent decision in *Miller* v. *Amusement Enterprises*, —— F.2d —— (5th Cir. No. 24259, April 8, 1968) (en banc). The Fifth Circuit rejected the distinction:

> We are unable to agree with those concepts which would prefer, or those which would demand, that the Civil Rights Act be narrowly construed, i.e., the establishments referred to in § 201(b)(3) must be places of entertainment which present exhibitions for spectators and that such exhibitions must move in interstate commerce. However, while not necessary to our decision, as will be seen by a further reading of this opinion, we find that Fun Fair is covered by the literal terms of the Act. Although it may be that the types of exhibition establishments listed in § 201(b)(3) are those which most commonly come to mind, no one would dispute the proposition that such list is not complete or exhaustive. Therefore, any establishment which presents a performance for the amusement or interest of a viewing public would be included. In our view Fun Fair is such an establishment. The amusement park presents a performance of small chil-

dren riding on various mechanical "kiddie" rides plus a performance of ice skating. It is obvious to us that many of the people who assemble at the park come there to be entertained by watching others, particularly their own children, participate in the activities available. In fact Mrs. Miller's presence at the park was to see her children perform on ice.[9] While the record does not explicitly and clearly show this to be a fact, aside from Mrs. Miller's statement, we as Judges may take judicial knowledge of the common ordinary fact that human beings are "people watchers" and derive much enjoyment from this pastime.[10]

Thus, the Fifth Circuit has held that the participative-exhibitive dichotomy adopted by the district court below and accepted by the panel is not a viable distinction in light of the Act's purpose. Surely the swimming, boating, picnicking, sun-bathing and dancing activities occurring at Lake Nixon are as much, if not more, spectator activities as those which occur at Fun Fair Park. In any event, the Fifth Circuit's conclusion was reached after extensive examination by the full court. This court should do no less.

B. The panel's majority sustained the district court's interpretation of the "entertainment" provisions of Title II

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[9] In Mrs. Miller's deposition she stated:

"Yes, my little boy particularly was interested in showing off—showing me how well he could skate, too."

[10] The following is from the record:

"How many people would you say were present?

"Well, I can't say exactly. There were people skating; there were people sitting in the seats; there were people standing waiting to be served."

(Slip opinion pp. 10-11) (Footnotes in court's opinion)

on another ground—that no effect upon interstate commerce had been shown.

Appellants are unable to accept the statements of the majority that there was a "total lack of any evidence that the operations of Lake Nixon in any fashion affect commerce" (Slip opinion, p. 17). We particularly call to the attention of the court the fact that Lake Nixon placed an advertisement in the magazine, "Little Rock Today." This magazine was described by the district court as "a monthly magazine indicating available attractions in the Little Rock area," *Kyles* v. *Paul*, 263 F.Supp. 412, 418 (E. D. Ark. 1967). This magazine fulfills the same function in Little Rock that the "Key" magazine fulfills in St. Louis, and we note the following statement from the masthead of the May, 1968 edition:

> Published monthly and distributed free of charge by Metropolitan Little Rock's leading hotels, chambers of commerce, motels and restaurants to their guests, new comers and tourists, and to reception rooms.

It should be obvious that any facility which places an advertisement in a magazine summarizing available attractions including entertainment opportunities and which magazine is distributed in hotels, willingly accepts, and indeed expects, the patronage of interstate travelers.[1] Certainly this Court may take judicial notice of the character of this magazine if it may take judicial notice of the "common knowledge" that a type of boat is manufactured in Arkansas (Slip Opinion, p. 14), leading to an

[1] The Club also advertised in *Little Rock Air Force Base* published at an Air Force base near Little Rock and over an area radio station (R. 11). Clearly, the facilities of Lake Nixon—including the concession stand—were "offered" to interstate travelers.

inference in the court's opinion that Lake Nixon's boating equipment was entirely intrastate, an inference clearly contradicted by the record (R. 14).[2] Furthermore, the Fifth Circuit concluded that the operations of the Fun Fair Amusement Park did affect commerce even though there was no proof whatsoever that the food sold at the concession stand originated outside Louisiana. In this case, the district court specifically found that ingredients of the hamburger buns and soft drinks originated outside Arkansas (263 F. Supp. at 418). The district court also discounted the influence of juke box records shipped in from outside the state,[3] but this reasoning was specifically condemned in the *Miller* case (see slip opinion at p. 17), and see *Twitty* v. *Vogue Theatre Corp.*, 242 F.Supp. 281 (M.D. Fla. 1965). Again, the rationale of the *Miller* case, if accepted by this Court, is clearly controlling and demands a reversal. (See especially, slip opinion, pp. 17-21.) That rationale should either be accepted or rejected by the entire Eighth Circuit where matters so important are concerned.

III

A. The consequences for the Civil Rights Act of 1964 will be equally grave if the concept of a "unitized operation," a locution which permits public accommodations to circumvent section 201(b)(4) of Title II is permitted to stand. This theory was first proposed by the district judge, without any authority therefor, and was approved in the majority opinion of the panel. Judge Heaney's

[2] Whether or not *some* boats of this type are manufactured in Arkansas, the boats involved in *this* case were imported from Oklahom (Slip opinion, p. 25).

[3] "There is no dispute that juke boxes were manufactured outside of Arkansas, and the same thing may be said about at least many of the records played on the machines" 263 F. Supp. at 417.

dissenting opinion exposes the irrational logic of the concept more clearly and eloquently than we are able, but we should like to emphasize the practical consequences of permitting this erroneous interpretation of the law to bear the stamp of this circuit. Thousands upon thousands of individual and corporate proprietors throughout the country who wish to discriminate against Negroes, or any other racial or religious group, and whom Congress wished to prohibit from engaging in such discrimination, will now be free to segregate their establishments by applying the circular reasoning of this case. First, it is said that Lake Nixon is not within section 201(b)(2) because it is not principally engaged in selling food. This statement is true enough—the major purpose of Lake Nixon's existence is not to sell food. However, the proprietor then argues, that there is no coverage under section 201(b)(4) because the food stand cannot be considered by itself to determine whether its principal intent is selling food (and thus whether it is a covered establishment within the premises of Lake Nixon and therefore whether Lake Nixon itself is covered). All this because the food stand is said to be merely an "adjunct" to the principal business of Lake Nixon. In effect, the food stand disappears from the view of the district court and the panel's majority in attempting to determine whether Lake Nixon is within the purview of the Civil Rights Act. And this despite the fact, which can hardly be contested, that the principal business of the food stand is selling food.

There was no basis for the district court's belief that Section 201(b)(4) contemplated an establishment under different ownership within the parent establishment. Even if that were so, the record here shows that while Lake Nixon was owned by Mr. and Mrs. Paul, the snack bar

was jointly owned by them and Mrs. Paul's sister (R.32). Thus, Lake Nixon meets even the judges' erroneous standard for coverage under Section 201(b)(4).

B. Beyond this, as a consequence of the Fifth Circuit's recent decision in *Fazzio Real Estate Co., Inc.* v. *Adams* (No. 24825, May 24, 1968) affirming *Adams* v. *Fazzio Real Estate Co.*, 268 F. Supp. 630 (E.D. La. 1967), there now exists a clear-cut conflict between the decision of this panel and that of the unanimous panel in *Fazzio Real Estate* [Judges Coleman and Clayton (who dissented from the en banc decision of the court in *Miller*); district judge Johnson]. The Fifth Circuit has affirmed a district court decision which rejected the "unitized operation" (263 F. Supp. 419) with sales "purely incidental to the recreational facilities" (263 F. Supp. 417) approach of the district court below and endorsed by the panel's majority here. As the court said:

> ". . . [I]f it be found—as it was in this case—that a covered establishment exists within the structure of a unified business operation, then under the provisions of Section 201(b)(4) of the Act the entire business operation located at those premises becomes a 'covered establishment.' The Act draws no distinction with regard to the principal purposes for which a business enterprise is carried on. Had a substantial business purpose test been intended, as urged by Fazzio, it would have been a very simple matter to include it in the Act. No such test was included with respect to the question of when the presence of one covered 'establishment' in a business enterprise will result in the entire operation's being treated as one establishment for the purpose of coverage under Sec-

tion 201(b)(4). In fact, the face of the Act specifically rebuts the existence of any substantial business purpose or 'functional unity' limitation on the meaning of the term 'establishment' as used throughout Section 201. Under Section 201(b)(4)(a) coverage may extend to both establishments within covered establishments and to an establishment 'within the premises of which is physically located any such covered establishment.'" (Slip opinion pp. 6-7)

* * * * *

"Fazzio's Bridge Bowl as an entity is not covered because it is principally engaged in selling food for consumption on the premises under Section 201(b)(2). Rather, Fazzio's is covered (1) because the refreshment counter is a covered establishment principally engaged in selling food for consumption on the premises within the meaning of Section 201(b)(2), and (2) because the covered refreshment counter is physically located within the premises of Fazzio's bowling operation [Section 201(b)(4)(a)(ii)] and the two stand ready to and do serve each others patrons. [Section 201(b)(4)(b)]." (Slip opinion pp. 7-8)

Obviously, the conflict of interpretation on this point should also be reviewed by the full court.

Conclusion

For the foregoing reasons, appellants urge that this petition for rehearing *en banc* be granted.

Respectfully submitted,

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Certificate

I hereby certify that the above petition is submitted in good faith and is not filed for delay. It is believed to be meritorious.

.....

NORMAN C. AMAKER

Certificate of Service

This is to certify that on this 31st day of May, 1968, I served a copy of Appellants' Petition for Rehearing *En Banc* upon Sam Robinson, Esq., Adkins Building, 115 East Capitol Street, Little Rock, Arkansas, by mailing a copy thereof to him at the above address via United States airmail, postage prepaid.

.....

NORMAN C. AMAKER
Attorney for Appellants

Order Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,824

DORIS DANIEL, *et al.*, *Appellants,*

vs.

EUELL PAUL, JR., *etc.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

There is before the Court appellants' petition for rehearing *en banc* and on consideration of such petition, It is the Order of the Court that the petition for rehearing *en banc* be, and it is hereby, denied.

June 10, 1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 488

MRS. DORIS DANIEL and MRS. ROSALYN KYLES,
Petitioners,

—v.—

EUELL PAUL, JR., Individually and as Owner, Operator or Manager of Lake Nixon Club,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was rendered May 3, 1968. A petition for a rehearing *en banc* was denied on June 10, 1968. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1254(1).

Questions Presented

1. Lake Nixon Club is a privately owned and operated recreational area open to the white public in general. Lake Nixon has facilities for swimming, boating, picnicking, sunbathing, and miniature golf. On the premises is a snack bar principally engaged in selling food for consumption on the premises which offers to serve interstate travelers and which serves food a substantial portion of which has moved in commerce.

a) Is the snack bar a covered establishment within the contemplation of Title II of the Civil Rights Act of 1964, and if so, does this bring the entire recreational area within the coverage of Title II?

b) Is the Lake Nixon Club a place of entertainment within the scope of Title II?

2. Petitioners are denied admission to Lake Nixon Club solely because they are Negroes. Have petitioners been denied the same right to make and enforce contracts and have an interest in property, as is enjoyed by white citizens, in violation of the Thirteenth Amendment and an Act of Congress, 42 U. S. C. §§1981, 1982?

Constitutional and Statutory Provisions Involved

This case involves the Commerce Clause, Art. 1, §8, cl. 3, and the Thirteenth and Fourteenth Amendments of the Constitution of the United States.

This case also involves the following United States statutes:

42 U. S. C. §1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U. S. C. §1982:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U. S. C. §2000a(b):

Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

Authorities Cited

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

MRS. DORIS DANIEL and MRS. ROSALYN KYLES,

Petitioners,

—v.—

EUELL PAUL, JR., Individually and as Owner, Operator or Manager of Lake Nixon Club,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled action on May 3, 1968, rehearing denied June 10, 1968.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit and the dissenting opinion of Judge Heaney are reported at 395 F. 2d 118, 127. They are set forth in the appendix, pp. 16a-40a. The opinion of the United States District Court for the Eastern District of Arkansas is reported at 263 F. Supp. 412 and is set forth in the appendix, pp. 1a-14a.

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

42 U. S. C. §2000a(c):

The operations of an establishment affect commerce within the meaning of this subchapter if . . . (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents, films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an

establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia; or between points in the same State but through any other State or the District of Columbia or a foreign country.

Statement

On July 18, 1966, petitioners, Mrs. Doris Daniel and Mrs. Rosalyn Kyles, Negro citizens of the City of Little Rock, Pulaski County, Arkansas, instituted a class action in the United States District Court for the Eastern District of Arkansas against Euell Paul, Jr., individually and as owner of Lake Nixon Club, Pulaski County, Arkansas (R. 1, 3, 4).[1] The petitioners claimed that the Lake Nixon Club was depriving them, and Negro citizens similarly situated, of rights, privileges and immunities secured by (a) the Fourteenth Amendment to the Constitution of the United States; (b) the Commerce Clause of the Constitution; (c) Title II of the Civil Rights Act of 1964 (42 U. S. C. §2000a), providing for injunctive relief against discrimination in places of public accommodation; and (d) 42 U. S. C. §1981, providing for the equal rights of citizens and all persons within the jurisdiction of the United States (R. 3). The complaint alleged that the Lake Nixon Club pursues a

[1] The certified record consists of one volume with district court proceedings independently paginated from the Eighth Circuit proceedings. All citations in the text are to the district court proceedings.

policy of racial discrimination in the operation of its facilities, services and accommodations; petitioners prayed for injunctive relief (R. 3).

On August 3, 1966, Mr. Euell Paul, Jr., answered the complaint (R. 1). At the trial, Mrs. Paul was made a party defendant without objection (R. 42; 263 F. Supp. at 414). After a trial without a jury, the District Court, on February 1, 1967, held that the Lake Nixon Club is not a place of public accommodation within the contemplation of the Civil Rights Act and that its operations do not affect commerce, and dismissed the complaint with prejudice (R. 61, 63; 263 F. Supp. at 420). The petitioners filed notice of appeal to the Court of Appeals for the Eighth Circuit on March 2, 1967 (R. 63).

The United States Court of Appeals for the Eighth affirmed the judgment of the District Court on May 3, 1968, Judge Heaney dissenting, 395 F. 2d 118, 127. On June 10, 1968, petitioners' petition for a rehearing was denied.

Lake Nixon Club is a recreational area comprising 232 acres (R. 43) and located about 12 miles west of Little Rock, Arkansas (Appellee's Brief in the Court of Appeals, 1). There is a State highway located 5 miles north of Lake Nixon and a U. S. highway located 5 miles to the south (Appellee's Brief in the Court of Appeals, 2).

During each season, approximately 100,000 people avail themselves of Lake Nixon's swimming, picnicking, boating, sun-bathing, and miniature golf (R. 44, 54; 263 F. Supp. at 416). The exact number of members is unknown and the Pauls do not maintain a membership list (R. 56, 263 F. Supp. at 417).

At Lake Nixon there is a snack bar which sells hamburgers, hot dogs, milk and sodas for consumption on the premises (R. 12, 30, 35; 263 F. Supp. at 416). The snack bar is operated by Mrs. Paul's sister under an oral agreement whereby the parties share the profits from the snack bar (R. 32). In 1966 the gross receipts from food sales accounted for almost 23% of the total gross receipts ($10,468.95 out of a total of $46,326.00) (R. 12, 63).

The equipment of Lake Nixon includes two juke boxes manufactured out of Arkansas (R. 55; 263 F. Supp. at 417); 15 aluminum paddle boats leased from an Oklahoma company, and a surfboard or yak purchased from the same company (R. 28, 29). The rental cost of the paddle boats is based on a percentage of the profits realized from their rental to patrons of Lake Nixon (R. 28).

Lake Nixon Club was advertised in the following media: (a) once in 1966 in *Little Rock Today*, a monthly publication distributed free of charge by Little Rock's leading hotels, chambers of commerce, motels and restaurants to their guests, newcomers and tourists; (b) once in 1966 in the Little Rock Air Force Base publication; (c) and three days each week from May through September, 1966, over radio station KALO (R. 11; Petition for Rehearing En Banc, 5; 263 F. Supp. at 417-418). A typical radio announcement stated:

> "Attention all members of Lake Nixon. In answer to your requests, Mr. Paul is happy to announce the Saturday night dances will be continued . . . Lake Nixon continues their policy of offering you year-round entertainment. The Villagers play for the big dance Saturday night and, of course, there's the jam session Sunday afternoon . . . also swimming, boating, and

miniature golf . . . " 395 F. 2d at 130, n. 10 (dissenting opinion).

On July 10, 1966, the petitioners sought admission to Lake Nixon (R. 38, 39). The District Court found that they were refused admission because they are Negroes (R. 58; 263 F. Supp. at 418). The District Court also found that Lake Nixon Club is not a private club within the contemplation of the 1964 Civil Rights Act, but is a facility open to the white public in general (R. 58; 263 F. Supp. at 418).

Jurisdiction of the District Court

Jurisdiction of the United States District Court for the Eastern District of Arkansas was based on 28 U. S. C. §§1343(3) and 1343(4).

Reasons for Granting the Writ

I.

Certiorari Should Be Granted (a) to Resolve a Conflict Between the Courts of Appeals for the Eighth and Fifth Circuits as to Establishments Covered by §201(b)(4) and (c)(4) of the 1964 Civil Rights Act, and (b) to Resolve a Conflict Between These Same Courts as to the Meaning of "Place of Entertainment" in §201(b)(3) and (c)(3) of the Same Act.

Lake Nixon Club is a public accommodation within the coverage of Title II of the Civil Rights Act of 1964 on both of the following grounds:

A) within the premises of Lake Nixon is physically located a lunch counter principally engaged in selling food

for consumption on the premises which offers to serve interstate travelers and which serves food a substantial portion of which has moved in commerce, and this lunch counter serves all patrons of Lake Nixon. 42 U. S. C. §2000a(b)(4) and (c)(4).

B) Lake Nixon is a place of entertainment which customarily presents sources of entertainment which move in commerce. 42 U. S. C. §2000a(b)(3) and (c)(3).

A. *Title II of the 1964 Civil Rights Act Applies to the Whole of Lake Nixon Because of Its Lunch Counter's Operations*

It is not disputed that the lunch counter at Lake Nixon is principally engaged in selling food for consumption on the premises. Coverage of the snack bar under Title II thus depends on whether it offers to serve interstate travelers or serves food or other products a substantial portion of which has moved in commerce.

The Court of Appeals found a total lack of proof of any offer to serve interstate travelers, 395 F. 2d at 127. The District Court did not specifically find whether the Pauls offered to serve interstate travelers. The District Court found no evidence that Lake Nixon "ever tried to attract interstate travelers *as such*" (R. 57; 263 F. Supp. at 418) (emphasis added).

Both Courts erred in failing to find that Lake Nixon offers to serve interstate travelers. The District Court specifically found that Lake Nixon is open to the white public in general (R. 58; 263 F. Supp. at 418) and concluded that "it is probably true that some out-of-state people" have used the facilities of Lake Nixon (R. 57; 263 F. Supp. at 418). An offer to serve the general public, under circumstances which make it reasonable to assume

that some interstate travelers will accept the offer, is an offer to serve interstate travelers, where there is no inquiry made as to the customers' origin. *Hamm* v. *Rock Hill,* 379 U. S. 306 (1964); *Miller* v. *Amusement Enterprises, Inc.,* 394 F. 2d 342 (5th Cir. *en banc,* 1968); *Evans* v. *Laurel Links, Inc.,* 261 F. Supp. 474 (E. D. Va. 1966); *Bolton* v. *State,* 220 Ga. 632, 140 S. E. 2d 866 (1965).

Circumstances which make it reasonable to assume that some interstate travelers will accept the offer to serve the general public are present in this case. The Pauls placed advertisements in magazines distributed to tourists and servicemen. Although radio announcements were addressed to "members" of Lake Nixon, 100,000 "members" use Lake Nixon's facilities each year and "members" bring guests. A reasonable conclusion is that a significant number of people know that Lake Nixon is in fact open to the white public in general and that a nominal membership fee of 25¢ is charged simply to exclude undesirables including Negroes (see dissenting opinion of Judge Heaney, 395 F. 2d at 130). The radio announcements suggest no geographical or other limitation on membership, 395 F. 2d at 130, n. 10 (dissenting opinion). That advertising is not geographically restricted is an important factor in finding an offer to serve interstate travelers. *Miller* v. *Amusement Enterprises, Inc., supra.*

Lake Nixon is only 5 miles from a U. S. highway and 5 miles from the nearest State highway. For the courts below this was too remote to affect commerce (395 F. 2d at 123, 125; R. 57; 263 F. Supp. at 418). In *Evans* v. *Laurel Links, Inc., supra,* however, the location of a golf course 4 blocks from a State highway and 5 miles from the nearest federal highway was deemed material to coverage under Title II of the 1964 Civil Rights Act.

There is no evidence that any inquiry is made as to the origin of "members" or their guests. No address is required on the membership cards, 395 F. 2d at 130, n. 9 (dissenting opinion). There is no list of members (R. 56; 263 F. Supp. at 417). No signs are posted excluding interstate travelers, 395 F. 2d at 130, n. 9 (dissenting opinion).

Not only does Lake Nixon offer to serve interstate travelers, but in addition a substantial portion of the food served and other products sold at the snack bar have moved in commerce. It is settled that substantial means "more than minimal". *Gregory* v. *Meyer*, 376 F. 2d 509, 511 n. 1 (5th Cir. 1967); *Newman* v. *Piggie Park Enterprise, Inc.*, 256 F. Supp. 941 (D. S. C. 1966), *rev'd on other grounds*, 377 F. 2d 433 (4th Cir. 1967), *modified and aff'd on other grounds*, 19 L. Ed. 1263 (1968) (18% is substantial); *Codogan* v. *Fox*, 266 F. Supp. 866 (M. D. Fla. 1967) (23-30% is substantial); *Hearings on S. 1732 Before the Senate Committee on Commerce*, 88th Cong., 1st Sess., ser. 26 at 24 (1963) (testimony of Attorney General Kennedy).

The only food served at the snack bar is hamburgers, hot dogs, sodas and milk (R. 12, 30, 35; 263 F. Supp. at 416); many soft drinks and hamburgers are sold (R. 32, 35). The District Court took judicial notice that the principal ingredients of bread are produced in states other than Arkansas, and that some of the ingredients of the soft drinks probably originated outside Arkansas (R. 58; 263 F. Supp. at 418). In addition, the snack bar contains a juke box manufactured outside of Arkansas; many of the records played on the juke box are also manufactured out of state (R. 55; 263 F. Supp. at 417). Therefore, the District Court and the Court of Appeals erred in failing to find that more than a minimal amount of the food served and the music played in the snack bar have moved in interstate commerce.

Because the snack bar is physically located within the premises of Lake Nixon and holds itself out as serving patrons of Lake Nixon, all of the facilities and privileges of Lake Nixon comprise a place of public accommodation within the contemplation of Title II.

Both the District Court and the Court of Appeals held that, because the gross income from food sales constitutes a relatively small percentage of the total gross income (23%) and the sale of food is merely an adjunct to the Pauls' principal purpose of providing recreational facilities, Lake Nixon is a single unit operation and thus not covered by 42 U. S. C. §2000a(b)(4). For the Eighth Circuit, coverage under Title II requires at least two establishments under separate ownership. See 395 F. 2d at 123. This holding is in conflict with the decision of every other court which has considered this subsection.

In *Fazzio Real Estate Co.* v. *Adams,* 396 F. 2d 146 (5th Cir. 1968), the Court held that where the operators of a bowling alley also operated a snack bar for the patrons of the bowling alley, the entire establishment was covered by this subsection. In *Fazzio,* income from the sale of food and beer represented 23% of the total gross income; income from the sale of food alone represented 8 to 11% of the total gross income. The Court held that even 8 to 11% could not be considered an insignificant adjunct and explicitly rejected the substantial business purpose test applied by the Eighth Circuit, *compare* 396 F. 2d at 150 *with* 395 F. 2d at 123. The Fifth Circuit stated, 396 F. 2d at 149:

> The Act contemplates that the term "establishment" refers to any separately identifiable business operation without regard to whether that operation is carried on in conjunction with other service or retail sales oper-

ations and without regard to questions concerning ownership, management or control of such operations.

In *Evans* v. *Laurel Links, Inc., supra,* the Court held an entire golf course within the coverage of Title II, because the operators of the golf course maintained a lunch counter for the patrons of the course. Income from food sales constituted 15% of the total gross income of the golf course. See also *Hamm* v. *Rock Hill, supra; Scott* v. *Young,* 12 Race Rel. L. Rep. 428 (E. D. Va. 1966) (recreational area with snack bar). The legislative history supports the majority rule. The Report of the House Judiciary Committee states that subsection (b)(4) "would include, for example, retail stores which contain public lunch counters otherwise covered by Title II". H. R. Rep. No. 914, 88th Cong., 1st Sess. 20 (1963).

Even under its own rule that Title II covers only separately managed but physically connected establishments, the Eighth Circuit erred in failing to find the snack bar's operations made Lake Nixon a public accommodation within the coverage of Title II. The evidence is that the snack bar is a separate enterprise managed by Mrs. Paul's sister pursuant to an oral contract whereby the Pauls and Mrs. Paul's sister share the profits from food sales (R. 32).

B. *Lake Nixon Is Place of Entertainment as Defined by Title II of the 1964 Civil Rights Act*

Even if Lake Nixon is found to be within the scope of subsection (b)(4) because of the presence of a snack bar within its premises, this Court should also determine whether Lake Nixon is a place of entertainment within the contemplation of the Civil Rights Act of 1964. The snack bar could be eliminated for the purpose of removing

Lake Nixon from Title II coverage; further litigation would then be necessary to determine whether Lake Nixon is a place of entertainment. This possibility is not fanciful for in a companion case involving a similar recreational area, all sales of food were discontinued after the petitioners instituted an action under Title II (R. 54; 263 F. Supp. at 417). In addition, the conflict between the Eighth Circuit's construction of "place of entertainment" and that of the Fifth Circuit in *Miller* v. *Amusement Enterprises, Inc., supra,* should be resolved.

The Eighth Circuit also held Lake Nixon was not a "place of entertainment", because the Court found a total lack of evidence that Lake Nixon's activities or entertainment moved in commerce, 395 F. 2d at 125. The District Court defined "other place of entertainment" to mean an establishment where the patrons are spectators or listeners and their physical participation is non-existent or minimal, and held that Lake Nixon is not within this definition (R. 60; 263 F. Supp. at 419).

In *Miller* v. *Amusement Enterprises, Inc., supra,* the Court of Appeals for the Fifth Circuit, sitting *en banc,* reversed the prior decision of a three-judge panel (reported at 391 F. 2d 86), and held that the Fun Fair amusement park is a place of entertainment within the coverage of Title II of the Civil Rights Act of 1964. Noting that it was not necessary to its decision, the Court held that even under a narrow construction of "place of entertainment" to include only places which present exhibitions for spectators, Fun Fair is a covered establishment, because "many of the people who assemble at the park come there to be entertained by watching others, particularly their own children, participate in the activities available", 394 F. 2d at 348. Swimming, boating, picnicking, sun-bathing

and dancing at Lake Nixon are certainly as much, if not more, spectator activities as ice-skating and "kiddie rides", see 394 F. 2d at 348.

In *Miller*, the Fifth Circuit rejected a narrow construction of "place of entertainment" and held that, in view of the inconclusive nature of the relevant legislative history and of the overriding purpose of the Civil Rights Act, "place of entertainment" should be construed liberally to mean "a place of enjoyment, fun and recreation", 394 F. 2d at 349.

The overriding purpose of Title II of the Civil Rights Act was to eliminate discrimination in those facilities which were the focal point of civil rights demonstrations. *Hearings on H. R. 7152 Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess., ser. 4, pt. 4, at 2655 (1963) (Testimony of Attorney Gen'l Kennedy). President Kennedy clearly intended that recreational areas and other places of amusement be covered. *Hearings on Miscellaneous Proposals Regarding Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess., ser. 4, pt. 2, at 1448-1449 (1963). Facilities which were the focal point of demonstrations were consistently identified in both the Senate and House hearings as lodging houses, eating places, and places of amusement or recreation. 110 Cong. Rec. 7383 (1964) (Remarks of Sen. Young). While the Senate was debating the Act, there were demonstrations at the Gwynn Oak Amusement Park in Maryland; Senator Humphrey stated that this was proof of the need for this Act. 109 Cong. Rec. 12276 (1963).

Under either a narrow or a liberal construction of "place of entertainment", coverage depends on whether Lake Nixon customarily presents sources of entertainment which move in commerce. The Eighth Circuit could not discern

any evidence that any source of entertainment customarily presented by Lake Nixon moved in interstate commerce, 395 F. 2d at 125.

In fact, "sources of entertainment" were intended to include equipment. In a discussion of subsection (c)(3), Senator Magnuson, floor manager of Title II, pointed out that if "establishments which receive *supplies, equipment* or goods through the channels of interstate commerce . . . narrow their potential markets by artificially restricting their patrons to non-Negroes, the volume of sales and therefore, the volume of interstate purchases will be less," 110 Cong. Rec. 7402 (1964) (emphasis added). In the discussion of the demonstration at the Gwynn Oak Amusement Park, Senator Humphrey believed that the park would be covered by the Act in part because he was "confident that merchandise and facilities used in the park were transported across State lines," 109 Cong. Rec. 12276 (1963).

Lake Nixon purchases and leases its boats from an Oklahoma company. The Pauls rent two juke boxes which were manufactured outside Arkansas and which play records manufactured outside Arkansas. In view of these facts the Eighth Circuit is in direct conflict with Fifth Circuit's decision in *Miller*. The *Miller* Court relied in part on the fact that 10 of the 11 "kiddie rides" at the park were purchased from out of state, 394 F. 2d at 351, to find an effect on commerce. But the Court also concluded that even under a narrow construction of the Act, since Fun Fair is located on a major highway and does not geographically restrict its advertising, the logical conclusion is that a number of the patron-performers move in commerce, 394 F. 2d at 349. The same circumstances which make it reasonable to assume that some interstate travelers

will accept Lake Nixon's offer to serve the general public make it reasonable to assume that some of Lake Nixon's patron-performers move in commerce.

The Eighth and Fifth Circuits are also in conflict as to the meaning of "move in commerce". The District Court found that Lake Nixon's operations do not affect commerce on the ground that, although the boats, juke boxes and records have moved in commerce, they do not now move (R. 62; 263 F. Supp. at 420). The Court concluded that because the phrase, "has moved", appears in the section concerning eating facilities, Congress must have intended to limit the section concerning places of entertainment to sources which "move", and therefore sources of entertainment which have, but no longer move, are not covered (R. 61-62; 263 F. Supp. at 420). The Fifth Circuit, on the other hand, expressly concluded in *Miller* that Congressional use of the present tense of "move" was not intended to exclude other tenses, 394 F. 2d at 351-52.

The legislative history supports the conclusion of the Fifth Circuit. The Report of the Senate Committee on Commerce refers within a single paragraph to "sources of entertainment which move in interstate commerce" and "entertainment that has moved in interstate commerce", as within the contemplation of subsection (c)(3). S. Rep. No. 872 on S. 1732, 88th Cong., 2nd Sess. 3 (1964). See also 110 Cong. Rec. 6557 (1964) (remarks of Sen. Kuchel). In addition, a proposal to amend section 2000a(c)(3) to read "sources of entertainment which move in commerce and have not come to rest within a state" was rejected. 110 Cong. Rec. 13915, 13921 (1964). The subsequent debate indicates that Congress intended the bill to reach businesses which had a minimal or insignificant impact on interstate commerce. 110 Cong. Rec. 13924 (1964).

II.

Certiorari Should Be Granted to Determine Whether the Equal Right to Make and Enforce Contracts and to Have an Interest in Property, Guaranteed by 42 U. S. C. §§1981, 1982, Includes the Right of Negroes to Have Access to a Place of Public Amusement.

In the Civil Rights Act of 1866, enacted pursuant to the Thirteenth Amendment, Congress provided, *inter alia*, for citizens to have the same right to make and enforce contracts and have an interest in property as is enjoyed by white citizens. These provisions are now embodied in 42 U. S. C. §§1981, 1982. Petitioners have been denied this right because the Pauls refused them the right to acquire for 25¢, a so-called "membership" in Lake Nixon Club solely on racial grounds. The district court found that "white applicants for membership are admitted as a matter of routine". (R. 56; 263 F. Supp. at 417).

In *Jones* v. *Mayer*, 36 U. S. L. W. 4661 (U. S. June 17, 1968), this Court held that §1982 forbade privately inflicted racial discrimination with respect to the acquisition and use of real property. This cause presents the important question whether the *Jones* principle applies, either directly or by necessary implication, to a place of public amusement. Neither of the lower courts ruled on this issue since *Jones* was decided subsequent to the Eighth Circuit's denial of rehearing.

In *Jones* this Court found §1982 justified as a legitimate exercise of Congressional power under the Thirteenth Amendment outlawing badges and incidents of slavery. This approval of the equal property rights guarantee of §1982

is directly applicable here because admission to Lake Nixon is in the nature of a right to use, for a time, the real and personal property of which the area consists. The fact that §1982 was not pleaded below does not bar petitioners from relying on it here because this Court has made clear that the "mere failure" to raise a constitutional question "prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground" *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 142-143 (1967), and cases cited. Furthermore, this precise issue was before this Court just last term in *Sullivan* v. *Little Hunting Park*, 36 U. S. L. W. 3481 (U. S. June 17, 1968) where this Court vacated the judgment of the Virginia Court of Appeals and remanded the case for further consideration in light of *Jones* even though the *Sullivan* petitioners did not rely on §1982 in the Virginia courts.

In any case, 42 U. S. C. §1981, which was specifically pleaded in the complaint herein, outlaws racial discrimination in contractual arrangements and, therefore, applies here because petitioners' race was the sole reason they were not permitted to purchase "membership" privileges at Lake Nixon.[2] It follows that the *Jones* holding that the 1866 Civil Rights Act, of which §1981 was an integral part, bars private racial discrimination is at least as applicable to Lake Nixon's "memberships" as it was to the corporate shares in *Sullivan* v. *Little Hunting Park, supra.*

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[2] There is little doubt that purchase of "membership" privileges, like the purchase of a ticket, to a place of public amusement includes judicially enforceable contractual rights, see *Griffin* v. *Southland Racing Corp.*, 236 Ark. 872, 370 S. W. 2d 429 (1963); *Vallee* v. *Stengel*, 176 F. 2d 697 (3rd Cir. 1949).

CONCLUSION

For the foregoing reasons the writ of certiorari should issue as prayed and the judgment of the United States Court of Appeals for the Eighth Circuit should be reversed or, in the alternative, vacated and remanded for further consideration in light of *Jones* v. *Mayer*, 36 U. S. L. W. 4661 (U. S. June 17, 1968).

Respectfully submitted,

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In the United States District Court Eastern District of Arkansas Western Division

[illegible] Kyles and Doris Daniel, Plaintiffs,	)	
v.	)	LR-66-C-146
[illegible] Paul, Jr., Individually and as Owner, [illegible] or Operator of the Lake [illegible] Club, Defendant.	)	
[illegible] Kyles and Doris Daniel, Plaintiffs,	)	
v.	)	LR-66-C-150
[illegible] A. Culberson, Individually and as Owner, Manager or Operator of Spring Lake, Inc., Defendant.	)	

APPENDIX

Memorandum Opinion of the District Court

These two suits in equity, brought under the provisions of Title II of the Civil Rights Act of 1964, P.L. 88-352, 2000a et seq., 78 Stat. 243 et seq., 42 U.S.C.A. [illegible] and 2000a-1 through 2000a-6, have been consolidated for trial and have been tried to the Court without a jury. Federal jurisdiction is not questioned and is established adequately by reference to section 207 of the Act, 42 U.S.C.A. 2000a-6.

Plaintiffs are Negro citizens of Little Rock, Pulaski County, Arkansas. The defendants in No. 146, Mr. and [illegible] Paul, Jr., own and operate a recreational [illegible] known as Lake [illegible]. The corporate defendant [illegible] Spring Lake Club, Inc., owns and operates a [illegible] known as Spring Lake. All of the [illegible]

CONCLUSION

For the foregoing reasons the writ of certiorari should issue as prayed and the judgment of the United States Court of Appeals for the Eighth Circuit should be reversed or, in the alternative, vacated and remanded for further consideration in light of *Jones v. Mayer*, U. S. L. W. 4661 (U. S. June 17, 1968).

Respectfully submitted,

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APPENDIX

In the United States District Court Eastern District of Arkansas Western Division

Rosalyn Kyles and Doris Daniel, Plaintiffs,

v.) LR-66-C-149

Euell Paul, Jr., Individually and as Owner Manager or Operator of the Lake Nixon Club, Defendant.

Rosalyn Kyles and Doris Daniel, Plaintiffs,

v.) LR-66-C-150

J. A. Culberson, Individually and as Owner, Manager or Operator of Spring Lake, Inc. Defendant.

Memorandum Opinion of the District Court

These two suits in equity, brought under the provisions of Title II of the Civil Rights Act of 1964, P.L. 88-352, §§201 et seq., 78 Stat. 243 et seq., 42 U.S.C.A., §§2000a and 2000a-1 through 2000a-6, have been consolidated for trial and have been tried to the Court without a jury. Federal jurisdiction is not questioned and is established adequately by reference to section 207 of the Act, 42 U.S.C.A., §2000a-6.

Plaintiffs are Negro citizens of Little Rock, Pulaski County, Arkansas. The defendants in No. 149, Mr. and Mrs. Euell Paul, Jr., own and operate a recreational facility known as Lake Nixon. The corporate defendant in No. 150, Spring Lake Club, Inc., own and operate a similar facility known as Spring Lake. All of the stock

in Spring Lake Club, Inc., except one qualifying share, is owned by the defendant, J. A. Culberson, and his wife.

The two establishments are not far from each other. Both are located in Pulaski County some miles west of the City of Little Rock. In July 1966 the two plaintiffs presented themselves at both establishments and sought admission thereto. They were turned away in both instances on the representation that the establishments were "private clubs."

On July 19 plaintiffs commenced these actions on behalf of themselves and others similarly situated. The complaints allege in substance that both Lake Nixon and Spring Lake are "Public Accommodations" within the meaning of Title II of the Act, and that under the provisions of section 201(a) they, and others similarly situated, are "entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations (of the facilities) without discrimination or segregation on the ground of race, color, religion, or national origin." They pray for appropriate injunctive relief as provided by section 201 of the Act.

In their answers the defendants[1] deny that Lake Nixon and Spring Lake are public accommodations within the meaning of the Act; affirmatively, they plead that the two facilities are "private clubs" and are exempt from the Act by virtue of section 201(a), even if initial coverage exists.

Sections 201(a) and 201(b) of the Act prohibit racial discrimination in certain types of public accommodations if their operations "affect" interstate commerce, or if racial discrimination or segregation in their operation is "supported by State action."

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[1]Originally, the suits were brought against Mr. Paul and Mr. Culberson only. At the commencement of the trial Mrs. Paul and Springs Lake Club, Inc., were made parties defendant without objection, and they have adopted, respectively, the answers of Mr. Paul and Mr. Culberson.

Section 201(b) makes the prohibition applicable to four categories of business establishments, namely:

"(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

"(2) any restaurant, cafeteria, lunchroom, lunch counter soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

"(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

"(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment."

Section 201(c) sets forth criteria whereby it may be determined whether an establishment affects interstate commerce. That section is as follows:

"The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (1) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragarph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, ex-

hibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several states, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country."

Section 101(d) is as follows:

"Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdicision thereof."

The exemption invoked by defendants appears in section 201(e) which provides that the provisions of Title II of the Act do not apply to "a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section."

Federal prohibitions of racial, ethnic or religious discrimination or segregation in State and municipal facilities are based ultimately on the 14th Amendment to the Constitution of the United States. Title II of the Civil Rights Act of 1964 finds its constitutional sanction in the commerce clause of the Constitution itself. Constitution, Article 1, Section 8, Clause 3. That Title II, as written, is constitutional is now settled beyond question, at least

as far as this Court is concerned at this time. Heart of Atlanta Motel v. United States, 379 U.S. 241; Katzenbach v. McClung, 379 U.S. 294; Willis v. The Pickrick Restaurant, E.D. Ga., 231 F.Supp. 396, appeal dismissed; Maddox v. Willis, 382 U.S. 18, rehearing denied, 382 U.S. 922.

The rationale of those holdings is that Congress permissibly found that racial discrimination, including racial segregation, in certain types of business establishments adversely affects interstate commerce, and acted constitutionally to prohibit such discrimination. These cases also establish that, even though practices on the part of an individual enterprise have no significant or even measurable impact on commerce, such practices by such enterprise are prohibited where they are of a type which Congress has found affects commerce adversely.

In coming to the latter conclusion the Court in McClung drew an analogy between an individual business man who practices racial discrimination and an individual farmer who violates a provision of the Government farm program. It was said (pp. 300-301 of 379 U.S.):

"It goes without saying that, viewed in isolation, the values of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in commerce. But, as our late Brother Jackson said for the Court in Wickard v. Filburn, 317 U.S. 111 (1942):

" 'That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution taken together with that of many others similarly situated, is far from trivial . . . . ' "

The burden in these cases is upon the plaintiffs to establish, first, that the facilities in question are establishments covered by the Act and, second, that plaintiffs have been subjected to racial discrimination prohibited by the Act. On the other hand, the burden is upon the respective defendants to show that they are entitled to the private club exemption which they invoke.

There is no serious dispute as to the facts in either case.

Lake Nixon has been a place of amusement in Pulaski County for many years. Several years ago the properties were acquired and improved by Mr. and Mrs. Paul, the present owners and operators. The Spring Lake property was acquired by Mr. Culberson in the spring of 1965 and the Spring Lake Club, Inc., was organized as an ordinary business and corporation under the general corporation laws of Arkansas on April 12 of that year.[2] Both establishments are operated for the financial profit of the owners or owner. During 1963 and 1966 Lake Nixon earned substantial profits; Mr. Culberson is not sure whether Spring Lake has earned profits; no dividends have been paid by the corporation, and Mr. Culberson has drawn no salary. He is engaged in a number of business enterprises, and Spring Lake is actually operated by hired employees of the corporation.

The facilities available at both establishments are essentially the same although those at Lake Nixon are considerably more extensive than those available at Spring Lake. Primarily, the recreation offered is of the outdoor type, such as swimming, boating, picnicing, and sun bathing. Lake Nixon also has a miniature golf course.

There is a snack bar at each establishment at which hamburgers, hot dogs, some sandwiches, soft drinks, and milk are sold to patrons during 1965 and 1966. However, the snack bar operations were purely incidental to the recreational facilities, and the income derived from the sales of food and drinks was small in comparison to the income derived from fees for the use of the recreational facilities. About the middle of August 1966 and after this suit was filed, the sale of food items at Spring Lake was discontinued entirely.

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[2] Mr. Culberson did not recall definitely whether title to the property was taken originally in his name and then transferred to the corporation or whether the former owner conveyed directly to the corporation. The matter is not material. Mr. Culberson's primary purpose in incorporating his operation was to avoid personal tort liability in case of accidental injury to a patron.

In each of the snack bars there is located a mechanical record player, commonly called a "Juke Box," which patrons operate by the insertion of coins. Patrons may dance to the juke box music or may simply sit and listen to it. There is no dispute that the juke boxes were manufactured outside of Arkansas, and the same thing may be said about at least many of the records played on the machines. The machines are rented from their local owner or owners by both of the establishments here involved.

During the months in which Lake Nixon is open, a dance is held once a week on Friday or Saturday night. An attendance charge is made with respect to these dances, and there is "live music" supplied by local bands made up of young people who call themselves by such names as "The Romans," "The Pacers," or "The Gents." Although the bands are compensated for their playing, actually the musicians are little more than amateurs, and their operations do not in general extend beyond the Little Rock-North Little Rock areas; certainly, there is nothing to indicate that these young musicians move in interstate commerce.

On occasions similar dances are held at Spring Lake, but they are sporadic and care is taken not to schedule a dance at Spring Lake for the same night on which a dance is to be held at Lake Nixon.

The operators of both facilities have stated candidly that they do not want to serve Negro patrons for fear of loss of business, and they do not desire to be covered by the Act. In this connection it appears that Mr. Culberson is willing to do just about anything in the future to avoid coverage if Spring Lake is in fact covered and non-exempt at this time.

Following the passage of the Act, Mr. and Mrs. Paul began to refer to their operation as a private club, and patrons have been required, at least during 1965 and 1966, to purchase "memberships" for the nominal fee of twenty-five cents a year or per season. These

fees are in addition to regular admission charges. A similar procedure has been following at Spring Lake which was not organized until after the passage of the Act. At Lake Nixon "memberships" to the "club" are sold by either Mr. or Mrs. Paul; at Spring Lake "memberships" are sold by whatever employee or employees happen to be in charge of the operation at the time.

The Court finds that neither facility has any membership committee; there is no limit on the number of members of either "club,"[3] no real selectivity is practiced in the selection of members; although at each establishment the management reserves the right to refuse to adult undesirables; there are no membership lists. The Pauls do not know how many people are "members" of the Lake Nixon Club; Mr. Culberson estimates that Spring Lake, the smaller of the operations, has about 4,000 "members." Subject to a few more or less accidental exceptions at Spring Lake, Negroes are not admitted to "membership" in either "club." White applicants for membership are admitted as a matter of routine unless there is a personal objection to an individual white person making use of the facilities.

The record reflects that during 1965 and 1966 Lake Nixon has used the facilities of Radio Station KALO to advertise its weekly dances; the announcements were made on Wednesday, Thursdays, and Fridays of each week from the last of May through September 7. During the same period, Lake Nixon inserted one advertisement in "Little Rock Today," a monthly magazine indicating available attractions in the Little Rock area, and inserted one advertisement in the "Little Rock Air Force Base," a monthly newspaper published at the Little Rock Air Force Base at Jacksonville, Arkansas.

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[3]When plaintiffs applied for admission to Lake Nixon and asked about joining the "club," they were told that the membership was full; the Pauls now admit that such statement was false in that there has never been and is not now any limit to the "membership" of the "club".

On June 4, and June 30, 1966, Spring Lake advertised Saturday night dances over Radio Station KALO; on May 26, 27, and 28 a dance was advertised over Station KAAY. Station KALO apparently leased the premises for a picnic held in July and advertised that picnic from June 6 through July 16.

In 1965 Spring Lake advertised certain dances by means of announcements over Station KALO. Two of these announcements indicated that there would be diving exhibitions during the intermissions, and one of the announcements was to the effect that in addition to the diving exhibition there would be a display of fireworks.

The record contains a sample of a brochure put out by Spring Lake; that brochure shows pictures of the facilities, describes them in some detail, refers without emphasis to "guest fees" in addition to the regular admission charge and points out that the fee of twenty-five cents is to be paid only once. Readers of the brochure are advised that the facilities may be reserved for private parties by telephoning "well in advance." The brochure also contains a map showing one how to reach Spring Lake, and the "membership cards" of Spring Lake depict a similar map.

As stated, both establishments are located some miles west of Little Rock. Both are accessible by country roads; neither is located on or near a State or federal highway. There is no evidence that either facility has ever tried to attract interstate travelers as such, and the location of the facilities is such that it would be in the highest degree unlikely that an interstate traveler would break his trip for the purpose of utilizing either establishment. Of course, it is probably true that some out-of-state people spending time in or around Little Rock have utilized one or both facilities.

Food and soft drinks are purchased locally by both establishments. The record before the Court does not disclose where or how the local suppliers obtained the products which they sold to the establishments. The

meat products sold by defendants may or may not have come from animals raised, slaughtered, and processed in Arkansas. The bread used by defendants was baked and packaged locally, but judicial notice may be taken of the fact that the principal ingredients going into the bread were produced and processed in other States. The soft drinks were bottled locally, but certain ingredients were probably obtained by the bottlers from out-of-State sources.

Turning now to the law, the Court will take up the issues in what appears to it to be a convenient, if perhaps not a strictly logical, order.

Defendants' claims of exemption as private clubs will be rejected out of hand. The Court finds it unnecessary to attempt to define the term "private club," as that term is used in section 201(a) because the Court is convinced that neither Lake Nixon nor Spring Lake would come within the terms of any rational definition of a private club which might be formulated in the context of an exception from the coverage of the Act. Both of these establishments are simply privately owned accommodations operated for profit and open in general to all of the public who are members of the white race. Cf. United States v. Northwest Louisiana Restaurant Club, W.D. La., 256 F. Supp. 151.

The Court finds without difficulty that plaintiffs were excluded from both facilities because they are Negroes. That fact was expressly admitted by Mr. Paul speaking for Lake Nixon and is inferable if not substantially admitted with respect to Spring Lake. The Court finds also that any other individual Negroes who might have applied for admission to the facilities during 1966 would have been excluded on account of their race, and that defendants will continue to exclude Negroes unless the Court determines that the facilities are covered by the Act.

This brings the Court to a consideration of the basic issue of coverage. The question is not whether Lake

Nixon and Spring Lake are "public accommodations," but whether they are public accommodations falling within one or more of the four categories of establishments covered by the Act.

It is not suggested that either establishment falls within the first statutory category, and the Court is persuaded that neither falls within the fourth. In that connection the Court finds that both Lake Nixon and Spring Lake are single unit operations with the sales of food and drink being merely adjuncts to the principal business of making recreational facilities available to the public. Section 201(b)(4) plainly contemplates at least two establishments, one of them covered by the Act, operating from the same general premises. See e.g. Pinkney v. Meloy, M.D. Fla., 241 F. Supp. 943. That situation does not exist here.

The second category set out in section 201(b)(2) consists of establishments "principally engaged" in the sale of food for consumption on the premises. Food sales are not the principal business of the establishments here involved, and the second category does not cover them. Cf. Newman v. Piggie Park Enterprises, Inc., D.C., S.C., 256 F. Supp 941.[4]

The third category, section 201(b)(3), includes certain specifically described places of exhibition or entertainment and also "any other place of exhibition or entertainment." It is clear that neither Lake Nixon nor Spring Lake is a motion picture house, concert hall, theatre, sports arena, or stadium. Hence, if either establishment is covered by the third category it must be on the theory that it falls within the catch-all phrase above quoted.

Determination of the scope of the catch-all phrase calls for an application of the Rule of ejusdem generis

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[4]In using the term "food sales" the Court includes sales of both food and soft drinks. That sales of drinks would not be considered as sales of "food" is indicated by Chava v. Sdrales, 10th Cir., 344 F. 2d 1019; Robertson v. Johnston, E.D. La., 249 F. Supp. 615; Tyson v. Cazes, E.D. La., 238 F. Supp. 937, rev'd on other grounds, 3 Cir. 363 F. 2d 742.

Robertson v. Johnston, E.D. La., 248 F.Supp. 618, 622. In that case it was pointed out that "place of entertainment" is not synonymous with "place of enjoyment." And in addition this Court will point out that "entertainment" and "recreation" are not synonymous or interchangeable terms.

The statutory phrase "other place of exhibition or entertainment" must refer to establishments similar to those expressly mentioned. When one considers the exhibitions and entertainment offered by motion picture houses, theatres, concert halls, sports arenas and stadiums, it is clear at once that basically patrons of such establishments are edified, entertained, thrilled, or amused in their capacity of spectators or listeners; their physical participation in what is being offered to them is either non-existent or minimal; their role is fundamentally passive.

The difference in what is offered by the establishments named in section 201(b)(3) and what is offered at Lake Nixon and Spring Lake is obvious. The latter establishments do not offer "entertainment" in the sense in which the Court is convinced that Congress used the word; what they offer primarily are facilities for recreation whereby their patrons can enjoy and amuse themselves.

In adopting section 201(b)(3) Congress must have been aware that "entertainment" and "recreation" are not synonymous or co-extensive, and had Congress intended to provide coverage with respect to a "place of recreation," it could have said so easily. The Court thinks that it is quite significant that neither the category in question nor any other category mentioned in section 201(b) makes any mention of swimming pools, or parks, or recreational areas, or recreational facilities. And the Court concludes that establishments like Lake Nixon and Spring Lake do not fall within section 201(b)(3) or any other category appearing in that section as it is presently drawn.

In coming to this conclusion the Court has not overlooked the dancing which has gone on at both establishments or the diving exhibitions and fireworks display at

Spring Lake. These exhibitions and that display were isolated events which took place in 1965, which have not been repeated, and which Mr. Culberson says will not be repeated. They were insignificant anyway, and it appears that the diving, which was done by life savers employed by Spring Lake, was not so much for the purpose of entertaining patrons as to demonstrate to them the competency of the life saving personnel.

As to the dancing, there are two things to be said: first, the dances held at Spring Lake play no significant part in the operations of that establishment, and the part played by the dances held regularly at Lake Nixon would seem to play a minor role in the Lake Nixon operation. Second, and more basically, it seems to the Court that dancing, whether to "live music" or to records played on a juke box, falls more within the concept of "recreation" than within the concept of "entertainment".

But, even if it be conceded to plaintiffs that the challenged establishments are "places of entertainment," the Court cannot find that under the law their operations affect interstate commerce. Certainly, the racial discrimination which the defendants have practiced has not been supported by the State of Arkansas or any of its political subdivisions.

Referring to section 201(c), the criterion which it establishes for the determination of whether a place of exhibition or entertainment "affects commerce" is whether the establishment in question customarily presents films, performances, athletic teams, exhibitions or other sources of entertainment which move in commerce." (Emphasis supplied.)

The emphasized words are not without significance when read in comparison with the statutory criterion for determining whether the operations of an eating establishment affect interstate commerce. With regard to such an establishment it is sufficient if it has served or offefed to serve interstate travelers or if a substantial portion of the food which it serves has moved in inter-

state commerce. There is a distinct difference between person or thing which **moves** in interstate commerce and a person or thing which simply **has moved** in interstate commerce.

As indicated, there is no evidence here and no reason to believe that the local musicians who play for the dances at Lake Nixon and Spring Lake have ever moved as musicians in interstate commerce or that they are now doing so. Nor do the juke boxes, the records and other recreational apparatus, such as boats, utilized at the respective establishments "move" in interstate commerce, although it is true that the juke boxes, some of their records, and part of the other recreational equipment and apparatus were brought into Arkansas from without the State.

The Court's approach to and its solution of the problems presented by these cases find full support in the opinion of Judge West in Miller v. Amusement Enterprises, Inc., E.D. La., 239 F.Supp. 323, a case involving a privately owned amusement park in Baton Rouge, Louisiana.[5]

From what has been said it follows that a decree will be entered dismissing the complaints in the respective cases.

Dated this 1st day of February, 1967.

s/ J. Smith Henley

United States District Judge

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[5]That case was decided on September 13, 1966, and the opinion was published on December 12 of that year after the instant cases were tried.

Decree

These two cases having been consolidated for purposes of trial and having been tried together, and the Court being well and sufficiently advised, and having filed herein its opinion incorporating its findings of fact and conclusions of Law in both cases,

It is by the Court Considered, Ordered, Adjudged, and Decreed that plaintiffs in said cases take nothing by their complaints, and that both of said complaints be, and they hereby are, dismissed with prejudice and at the cost of plaintiffs.

Dated this 1st day of February, 1967.

s/ J. Smith Henley

United States District Judge

Opinion of the United States Court of Appeals

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 18,824

Mrs. Doris Daniel and Mrs. Rosalyn Kyles,
Appellants,
v.
Euell Paul, Jr., Individually and as Owner, Operator or Manager of Lake Nixon Club,
Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

[May 3, 1968.]

Before VAN OOSTERHOUT, Chief Judge; MEHAFFY and HEANEY, Circuit Judges.

MEHAFFY, Circuit Judge.

Doris Daniel and Rosalyn Kyles, plaintiffs-appellants, Negro citizens and residents of Little Rock, Pulaski County, Arkansas, were refused admission to the Lake Nixon Club, a recreational facility located in a rural area of Pulaski County and owned and operated by the defendant-appellee Euell Paul, Jr. and his wife, Oneta Irene Paul. Plaintiffs

brought this suit seeking injunctive relief from an alleged discriminatory policy followed by defendant denying Negroes the use and enjoyment of the services and facilities of the Lake Nixon Club.[1] This suit was brought as a class action under Title II of the Civil Rights Act of 1964, P.L. 88-352, §§ 201 *et seq.*, 78 Stat. 243 *et seq.*, 42 U.S.C. §§ 2000a *et seq.*, alleging that the Lake Nixon Club is a "public accommodation" as the term is defined in the Act, and that, therefore, it is subject to the Act's provisions.

For the purpose of trial this case was consolidated with a similar suit brought by plaintiffs against Spring Lake Club, Inc. The trial was to Chief District Judge Henley who held that neither Lake Nixon Club nor Spring Lake, Inc. was a "public accommodation" as defined in and covered by Title II of the Civil Rights Act of 1964, and ordered dismissal of the complaints. We are concerned solely with the court's decision with regard to Lake Nixon Club, since there was no appeal from the portion of the decision regarding Spring Lake, Inc. Chief Judge Henley's memorandum opinion is published at 263 F.Supp. 412. We affirm.

The plaintiffs alleged in their complaint that the Lake Nixon Club is a place of public accommodation within the meaning of 42 U.S.C. §§ 2000a *et seq.*; that it serves and offers to serve interstate travelers; that a substantial portion of the food and other items which it serves and uses moves in interstate commerce; that its operations affect travel, trade, commerce, transportation, or communication among, between and through the several states and the District of Columbia; that the Lake Nixon Club is operated under the guise of being a private club solely for

[1] At the trial, an oral amendment was made and accepted making Mrs. Paul a party to the action.

the purpose of being able to exclude plaintiffs and all other Negro persons; and that the jurisdiction of the court is invoked to secure protection of plaintiffs' civil rights and to redress them for the deprivation of rights, privileges, and immunities secured by the Fourteenth Amendment to the Constitution of the United States, Section 1; the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States; 42 U.S.C. § 1981, providing for the equal rights of citizens and all persons within the jurisdiction of the United States; and Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. §§ 2000a *et seq.*, under which they allege that they are entitled to an injunction restraining defendant from denying them and others similarly situated admission to and full use and enjoyment of the "goods, services, facilities, privileges, advantages, and accommodations" of the Lake Nixon Club.

The defendant denied that Lake Nixon is a place of public accommodation within the meaning of the Act; denied that Lake Nixon serves or offers to serve interstate travelers or that a substantial portion of the food and other items which it serves and uses moves in interstate commerce; denied that its operations affect travel, trade, commerce, transportation or communication between and through the several states and the District of Columbia within the meaning of the Act; and, further answering, averred that defendant operates Lake Nixon Club as a place to swim; that he has a large amount of money invested in the facility; that if he is compelled to admit Negroes to the lake, he will lose the business of white people and will be compelled to close his business; that the value of his property will be destroyed; and that he will be deprived of his rights under the Fourteenth Amendment to the Constitution of the United States.

The provisions of the Civil Rights Act of 1964 which define "a place of public accommodation" as covered by the Act, and which plaintiffs contend bring the Lake Nixon Club within its coverage, are contained in 42 U.S.C. § 2000a (b), and provide as follows:

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter *if its operations affect commerce,* or if discrimination or segregation by it is supported by State action:

"(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

"(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

"(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment." (Emphasis added.)

It will be noted that an establishment falling in any of the four categories outlined above is covered by the Act only "if discrimination or segregation by it is supported by State action," which is not contended here, or "if its

operations affect commerce." The criteria for determining whether an establishment affects commerce within the meaning of the Act are set forth in 42 U.S.C. § 2000a (c), as follows:

> "(c) The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents, films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country."

The facts in the case are relatively simple and not in material dispute. The Lake Nixon property, consisting of 232 acres, is located on a country road several miles from the City of Little Rock and is not close to any state or federal highway. In 1962 Paul and his wife purchased this property, and since that time they have made their

home there and operated the facility for recreational purposes. In 1964 they adopted a club plan in order to prevent undesirables from using the facility, with no thought of simply excluding Negroes, as no Negro had ever sought admission.[2] A membership fee of 25¢ per person per season was charged. The only Negroes who ever sought admission were the two plaintiffs and a young Negro man who accompanied them to Lake Nixon on July 10, 1966. When they sought to use the facilities, Mrs. Paul told them that the membership was filled, but candidly testified at the trial that their admission was denied because of their race. In response to written interrogatories propounded to Mr. Paul in a discovery deposition, he replied that he and his wife exercised their own judgment in accepting applicants for membership and refused those whom they did not want. Referring to the plaintiffs, Mr. Paul stated:

> "At that time, we refused admission to them because white people in our community would not patronize us if we admitted Negroes to the swimming pool. Our business would be ruined and we have our entire life savings in it."

Mr. and Mrs. Paul invested $100,000.00 in the property, and, although it is operated only during the swimming season—from some time in May until early September depending upon the weather—it has earned a substantial and comfortable livelihood for them, producing net profits in excess of $17,000.00 annually.

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[2] In this regard, Mrs. Paul testified as follows:

"Q. Now, what do you have out there, Mrs. Paul, by way of facilities for the people that come out there; do you operate it as a club?
"A. Yes, we do, we operate it as a club.
"Q. Now, at the time you put this on a club basis did you do it for the purpose of excluding Negroes?
"A. Well, no, because there had never been any out there; it was five miles to the closest Negro addition; and it was really the last thing on our mind at the time; we had to do it to eliminate undesirables."

Plaintiff Mrs. Doris Daniel, who lived in Little Rock some twelve miles from Lake Nixon, was the only witness who testified on behalf of the plaintiffs. The other evidence is incorporated in pretrial answers to interrogatories and the testimony of Mr. and Mrs. Paul. Mrs. Daniel testified that she was employed as a secretary for Christopher C. Mercer, Jr. She further testified that she went to Lake Nixon Club on about July 10, 1966, accompanied by a girl friend, Rosalyn Kyles, the other plaintiff, and a male acquaintance. She told the attendant at the admission window that they would like to come in but was advised that they would have to wait and see the lady in the next room. Mrs. Paul was the lady to whom they were referred, and Mrs. Daniel testified that "she asked if we were members; and we stated we weren't; she said we would have to be members to come in; and we asked to get application to apply for membership and she said I'm sorry, but we're filled up." This witness had never been to Lake Nixon before and testified that she had heard the advertising on the radio and people talking about it and went out to look it over, and perhaps participate in some of the activities. She took her swimming suit with her.

While the principal attraction at Lake Nixon is swimming, the facility also had, at the time of the trial of this case, fifteen aluminum paddle boats available for rent; two coin-operated juke boxes, and a miniature golf course. Also operated in connection with the business was a snack bar which offered for sale hamburgers, hot dogs, milk and soft drinks, but did not stock or sell coffee, tea, cigars, cigarettes, sugar or beer. On Friday nights there usually would be a dance at Lake Nixon with "live music" furnished by young musicians from the Little Rock area who were amateurs and also patrons of the facility. There is no evidence that they ever played outside this immediate

locality, but to the contrary the undisputed evidence indicates that they did not.[3]

Mr. Paul further stated in response to interrogatories that during the preceding twelve months the Lake Nixon Club had advertised only twice in a paper or magazine—one time in May in a local monthly magazine entitled "Little Rock Today," and one time in June in a monthly paper published at the Little Rock Air Force Base. Announcements of the dances were also made on a local radio station, inviting members of the club to attend.[4]

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[3] Mr. Paul testified on cross-examination as follows:

"Q. Now, did you have bands out at your place on the week ends?
"A. Yes.
"Q. Were they local bands?
"A. Yes.
"Q. Do you know whether those bands happened to play in Jacksonville?
"A. No.
"Q. You really don't know where they played, do you?
"A. Yes, I'm pretty certain they played just right here in Little Rock.
"Q. Just for you; what band was it?
"A. Well, we had the Romans, the Loved Ones. I can't remember the names of all——
"Q. You had a lot of different bands?
"A. Yes.
"Q. How can you be sure that they just played in Little Rock?
"A. Because they were members there and were frequently out there; they mostly worked in town and this was a hobby; they were not professionals."

[4] Mr. Paul testified as follows:

"Q. Did you advertise for persons to come and make use of the facilities during the summer?
"A. Members only.

"A. Our opening statement was basically, well, specifically stated that it was for members only.
"Q. For members only?
"A. Yes."

Mrs. Paul testified as follows:

"Q. I believe there has been some evidence introduced of the ads you had over the radio, were those ads addressed to members of the club?
"A. Members of Lake Nixon.
"Q. To members of Lake Nixon?
"A. To all members of Lake Nixon it usually ran."

The food business at Lake Nixon was minimal. According to the stipulation of the parties, the net income from food and concession sales was only $1,412.62 for the entire 1966 season. There were an estimated 100,000 admissions to Lake Nixon during the season and the food sold there was a minor and insignificant part of the business. The testimony was that the club was not in the food business but merely had the snack bar as a necessary adjunct to serve those who wished to refresh themselves during an afternoon or evening of participation in the various forms of recreation offered—swimming, boating, minature golfing, or dancing.[5]

The district court found that Lake Nixon was not a private club but was simply a privately owned accommodation operated for profit and open in general to all members of the white race. The court further found that the defendants were excluded on account of their race but that the Lake Nixon Club did not fall within any of the four categories designated by Congress as "public accommodations" which affect commerce within the meaning of the Civil Rights Act of 1964, and, therefore, the Club was not subject to its provisions. We agree with the court's conclusion.

Plaintiffs do not contend that Lake Nixon falls within the first category pertaining to inns, hotels, motels, etc. They do, however, contend that the three remaining categories bring it within the Act.

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5 Mr. Paul testified on cross-examination as follows:

"Q. But sales from sandwiches and the like did account for a large degree of your gross sales; is that true?

"A. No, very minor what we make off of that; food was just a commodity to have there for the peole if they wanted it; I mean we were not in the food business—there was no restaurant—it was just a necessity."

As hereinbefore pointed out, the second category includes "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises," if its operations affect commerce, but not otherwise. In determining whether its operations affect commerce, we must look to 42 U.S.C. § 2000a (c), which provides that the operations of an establishment affect commerce within the meaning of this subchapter in the case of an establishment described in paragraph (2) of subsection (b), if it "serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce."

The trial court found that there was no evidence that the Lake Nixon Club has ever tried to attract interstate travelers as such, and that the location of the facility is such that it would be of the highest degree unlikely that an interstate traveler would break his trip for the purpose of utilizing its facilities, it being located on a country road remote from either a federal or a state highway. With regard to the food served, the trial court reasoned that since the second category consists of establishments "principally engaged" in the sale of food for consumption on the premises and since food sales are not the principal business of the Lake Nixon Club, it would not be included in the second category. In this connection, the court held that the Lake Nixon Club was a single unitized operation, with the sale of food and drink being merely adjuncts to the principal business of making recreational facilities available to the public, and that, therefore, it would not come within the fourth category making the Act applicable to an establishment otherwise covered or within the premises of which is physically located any such covered establishment.

With regard to whether a substantial portion of the food which Lake Nixon serves has moved in commerce, the trial court found that food and soft drinks were purchased locally by the Club but noted that the record before the court did not disclose where or how the local suppliers obtained the products. The court further observed that the meat products sold by the defendants may or may not have come from animals raised, slaughtered, and processed in Arkansas. It also made an observation that the bread used in the sandwiches was baked and packaged locally but took judicial notice that the principal ingredients going into the bread were produced and processed in other states. This observation on the part of the court, however, was entirely voluntary, and the ingredients in the bread would not constitute a substantial part of the food served. We might add that it is a matter of common knowledge that Borden's of Arkansas, which the record shows supplied the milk, obtains the unprocessed milk for its local plant from Arkansas dairy farmers.

Looking to the legislative history of the Civil Rights Act for an indication regarding what the proponents of the bill intended by the use of the word "substantial" in § 2000a (c), we note that Robert F. Kennedy, who was then Attorney General, expressed the opinion in the hearings on S. 1732 before the Senate Committee on Commerce that the word "substantial" means "more than minimal." *Codogan* v. *Fox*, 266 F.Supp. 866, 868 (M.D. Fla. 1967). In *Newman* v. *Piggie Park Enterprises, Inc.*, 256 F.Supp. 941 (D. S.C. 1966), rev'd on other grounds, 377 F.2d 433 (4th Cir. 1967), cert. granted, 88 S.Ct. 87, the court held that where the evidence showed that at least 40% of the food moved in commerce, this was a "substantial" portion under a construction of the word in its usual and customary meaning, which the court defined as follows: "some-

thing of real worth and importance; of considerable value; valuable; something worthwhile as distinguished from something without value or merely nominal." In the *Newman* case, the district court held that the five drive-in restaurants belonging to Piggie Park Enterprises, Inc., all of which were located on or near interstate highways, were not covered by the Act because the evidence showed that less than 50% of the food was eaten on the premises, but the Fourth Circuit Court of Appeals reversed, holding that the test in construing this provision of the Act was not whether a principal portion of the food was actually consumed on the premises but whether the establishment was principally engaged in the business of selling food ready for consumption on the premises.

In *Willis* v. *Pickrick Restaurant*, 231 F.Supp. 396 (N.D. Ga. 1964), where the restaurant had annual gross receipts from its operations of over $500,000.00 for the preceding year and its purchases of food exceeded $250,000.00, the court found that a substantial part of this large amount of food originated from without the state and that, therefore, it affected commerce. Furthermore, while there was little evidence that it actually served interstate travelers, the evidence was clear that it offered to serve them by reason of the fact that it had large signs on two federal highways, and the restaurant itself was on the main business route of U. S. 41, a federal interstate highway.

In *Gregory* v. *Meyer*, 376 F.2d 509 (5th Cir. 1967), the court held that the question of the amount of food served in a restaurant which has moved in interstate commerce is a relative one and that the drive-in there involved, which had an annual sales of about $71,000.00, of which approximately $5,000.00 resulted from the sale of coffee and tea which had moved in interstate commerce, and which de-

rived two-thirds of its sales volume from beef products which came from a meat packer who purchased twenty to thirty per cent of his cattle from another state, was covered by the Act. Furthermore, the drive-in in the *Gregory* case was located only three blocks from a federal highway, on a street which was an extension of the highway, and the court found that it was engaged in offering to serve interstate travelers.

The case of *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), is likewise distinguishable. The Supreme Court there stated at page 298: "In this case we consider its [the Act's] application to restaurants which serve food a substantial portion of which has moved in commerce." The restaurant there was located on a state highway, eleven blocks from an interstate highway, and evidence was introduced that 46% of the food served was meat which had been procured from outside the state.

The case of *Evans* v. *Laurel Links, Inc.*, 261 F.Supp. 474 (E.D. Va. 1966), cited by plaintiffs, is likewise factually inapposite. In the *Evans* case, it was stipulated that a portion of the food served moved in interstate commerce and that each year out-of-state teams participated in team matches; further, that the golf shop sold golf equipment, most of which was manufactured outside the state and had moved in interstate commerce. The court found that the lunch counters at Laurel Links served and offered to serve interstate travelers and also that the defendant customarily presented athletic teams which moved in commerce, thereby bringing it under subsection (b), paragraph (3) and subsection (c) of 42 U.S.C. § 2000a. The court there said at page 477: "The Act applies because an out-of-state team plays on the defendant's course on a regularly scheduled annual basis."

In the record before us, there is a total lack of proof that Lake Nixon Club served or offered to serve interstate travelers or that a substantial portion of the food which it served moved in interstate commerce. Therefore, all of the cases cited by the parties are distinguishable inasmuch as there is not a word of record testimony here that would justify a conclusion that the concession stand engaged in or offered to engage in any business affecting commerce. The same can be said with respect to the recreational facilities at Lake Nixon. There is not one shred of evidence that Lake Nixon customarily presented any activity or source of entertainment that moved in interstate commerce.

The evidence here is that Lake Nixon is a place for swimming and relaxing. While swimming is the principal activity, it does have fifteen aluminum paddle boats which are leased from an Oklahoma-based company and a few surf boards. It is common knowledge that annually thousands of this type boat are manufactured locally in Arkansas, and there is no evidence whatsoever that any of the equipment moved in interstate commerce. Furthermore, we do not interpret the law to be that coverage under the Act extends to businesses because they get a portion of their fixtures and/or equipment from another state. Otherwise, the businesses which the Act's sponsors and the Attorney General of the United States specifically said were not covered would be included in the coverage.[6] There were two juke boxes obtained from a local amusement company which provided music upon the insertion of a coin. As hereinbefore stated, there usually would be a dance on Friday nights if the weather was good, and the

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[6] Senator Magnuson, floor manager of Title II, said that dance studios, bowling alleys and billiard parlors would be exempt. 110 Cong. Rec. 7406 (4/9/64); *Miller* v. *Amusement Enterprises, Inc.*, ... F.2d ... (5th Cir. #24259 9/6/67).

dances were sometimes advertised on a local radio station, apprising the members concerning the dance and inviting them to attend.

When the juke boxes were not utilized at the Friday-night dances, a small band was provided but it was composed of local young amateurs and members of the Club, and there is no evidence whatsoever that they ever played outside Pulaski County. Such operations do not affect commerce under the definition of the statute which makes coverage applicable if the operation "customarily presents films, performances, athletic teams, exhibitions or other sources of entertainment which move in commerce." It was clearly not the intention of the Congress to include this type of recreation within the coverage of the Act, but, even if it should be construed as entertainment within the definition of the Act, it did not move in commerce and consequently is not proscribed.

The Civil Rights Act of 1964, as everyone knows, is a compromise act. It was not intended to be all inclusive, and, in this regard Senator Humphrey, a leading proponent of the bill, stated:

> "The reach of that title [H.R. 7152] is much narrower than when the bill was first introduced. It is also narrower than S. 1732, the bill reported by the Senate Commerce Committee, which covers the general run of retail establishments. . . . The deletion of the coverage of retail establishments generally is illustrative of the moderate nature of this bill and of its intent to deal only with the problems which urgently require solution." 110 Cong. Rec. 6533.[7]

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7 This extract is taken from the legislative history furnished the Fifth Circuit by the Civil Rights Division of the Department of Justice and attached to the opinion in *Miller* v. *Amusement Enterprises, Inc.*, *supra*.

Additionally, Senator Humphrey stated:

> "Of course, there are discriminatory practices not reached by H. R. 7152, but it is to be expected and hoped that they will largely disappear as the result of voluntary action taken in the salutory atmosphere created by enactment of the bill." 110 Cong. Rec. 6567.[8]

Senator Magnuson, who was floor manager of Title II, discussed this title in detail and said:

> "The types of establishments covered are clearly and explicitly described in the four numbered subparagraphs of section 201 (b). An establishment should have little difficulty in determining whether it falls in one of these categories. . . . Similarly, places of exhibition and entertainment may be expected to know whether customarily it (sic) presents sources of entertainment which move in commerce." 110 Cong. Rec. 6534.[9]

A section-by-section analysis of S. 1732 appears in 2 U. S. Cong. & Adm. News '64 at pages 2356 *et seq.* In a paragraph concerning subsection 3 (a) (2), it was stated:

> "This subsection would include all public places of amusement or entertainment which customarily present motion pictures, performing groups, athletic teams, exhibitions, or *other sources of entertainment which move in interstate commerce.*" (Emphasis added.)

We have no disagreement with the trial court's rationale or with its utilization of the rule of *ejusdem generis* in arriving at its conclusion, but our view is that subsection (c) of the statute so plainly defines the operations that affect commerce that it is obvious that Lake Nixon's ac-

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[8] See n. 7.

[9] See n. 7.

tivities are not proscribed by the Act. Plaintiffs' argument that the Act applies is based on the false premise that a "substantial portion of the food sold has traveled through interstate commerce," which is wholly unsupported by the evidence. Treating this false assumption as a fact, plaintiffs then conclude that "the operation of the snack bar affects commerce within the meaning of § 201 (c) (2) of Title II."

In *Miller* v. *Amusement Enterprises, Inc.*, . . . F.2d . . . (5th Cir. # 24259 9/6/67), the panel requested the United States, acting through its Civil Rights Division in the Department of Justice, to file with the court its brief setting forth the legislative history of these provisions insofar as pertinent. The response of the Civil Rights Division is attached to that opinion. The opinion by the three-judge panel in *Miller* was subsequently reversed by a divided court sitting en banc in an opinion handed down April 8, 1968. We cite the panel's slip opinion merely because it incorporates the Government's reference to the legislative history of the Act, a part of which we have heretofore referred to. The facts in the *Miller* case are patently distinguishable from those in the instant case. As examples, in *Miller* the amusement park was "located on a major artery of both intrastate and interstate transportation: . . . its advertisements solicit the business of the public generally" and were not confined to club members; and "ten of its eleven mechanical rides admittedly were purchased from sources outside Louisiana."

What clearly distinguishes the case before us from other cases filed under this statute is the total lack of any evidence that the operations of Lake Nixon in any fashion affect commerce. There is no evidence that any interstate traveler ever patronized this facility, or that it offered to

serve interstate travelers, or that any portion of the food sold there moved in commerce, or that there were any exhibitions or other sources of entertainment which moved in or affected commerce.

The Congress by specifically and in plain language defining the criteria for coverage under subsection (c) precludes the court from holding upon any rule of construction that interstate commerce was affected absent requisite evidence establishing the criteria spelled out in the statute. There is no such evidence in this record.

We have read all the cases cited by the parties, as well as others, and our research has failed to disclose a single case where there was a complete absence of evidence, as there is in the instant case, to establish coverage under the Act.

The judgment of the district court is affirmed.

HEANEY, Circuit Judge, dissenting:

In my view, the judgment of the District Court cannot be upheld. It is based on an erroneous theory of the law and is not supported by the facts found by the court.

The court held that the Lake Nixon Club is not a covered establishment under the Civil Rights Act of 1964, §§ 201 (b)(2) and (4), 42 U.S.C. 2000(b)(2) and (4)(1964), despite the fact that a lunch counter is operated on the premises, because the lunch counter is merely an adjunct to the business of making recreational facilities available to the public, and is not a separate establishment.

This conclusion is not supportable. Whether the lunch counter is an adjunct of or necessary to the operation of the Club is immaterial, as is the question of whether the

of the minority stated that "Section 201(d) precludes racial discrimination * * *. * * * [of] a department store (operating a lunch counter) * * *"[5]

In *Drews*,[6] *Evans*, *Adams* and *Scott*, the records indicate that the lunch counter and the recreation facility were owned by the same entity and operated as one coordinated facility.

The District Court relies on *Pinkney* v. *Meloy*, 241 F. Supp. 943 (N.D. Fla. 1965), to support its holding that a lunch counter must be a separate establishment (apparently separately owned) to evoke § 201(b)(4). There, the court held that a barber shop could not discriminate as it was located within a hotel, which was a covered establishment. The barber shop was separately owned, but that fact was not critical to the *Pinkney* decision. The legislative history of the Act gives as an example the precise fact situation involved in *Pinkney*:

> "A hotel barber shop or beauty parlor would be an integral part of the hotel, *even though* operated by some independent person or entity [Emphasis added]."[7]

The majority opinion of this Court does not base its decision on the rationale of the District Court that Lake Nixon is not a covered establishment within the meaning of §§ 201(b)(2) and (4). It relies instead on an alternative ground, namely, that even if it is otherwise covered, "There is a total lack of proof that Lake Nixon Club

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5 Additional Views on H.R. 7152 of Hon. William M. McCulloch, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McC. Mathias, Hon. James E. Bromwell, 1964 *U. S. Code Cong. & Ad. News*, 2487, 2494.

6 *Drews* v. *State*, 224 Md. 186, 167 A.2d 341, 342 (1961).

7 Senate Report (Judiciary Committee) No. 872, 1964 *U. S. Code Cong. & Ad. News*, 2355, 2358-59.

served or offered to serve interstate travelers or that a substantial portion of the food served moved in interstate commerce." One of these elements must, of necessity, be established to bring the Club within the Act.[8]

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8 It need not be established that the defendants' food "operations affect commerce" if the discriminatory practices by the defendants were "supported by state action." A state action theory of the case was not alleged nor argued.

The 1964 Civil Rights Act specifically defines "supported by state action:"

> "§ 201(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof."

An Arkansas statute purports to give an omnibus right to discriminate:

> "§ 71-1801. *Right to select customers, patrons or clients.*—Every person, firm or corporation engaged in any public business, trade or profession of any kind whatsoever in the State of Arkansas, including, but not restricted to, * * * restaurants, dining room or lunch counters, * * *, or other places of entertainment and amusement, including public parks and swimming pools, * * *, is hereby authorized and empowered to choose or select the person or persons he or it desire to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve; * * *."

Arkansas Statutes Annotated, Vol. 6A (1967 Supp.).

The statute is further supported by criminal sanctions:

> "§ 71-1803. *Failure to leave after request—Penalty.*—Any person who enters a public place of business in this State, or upon the premises thereof, and is requested or ordered to leave therefrom by the owner, manager, or any employee thereof, and, after having been so requested or ordered to leave, refuses so to do, shall be guilty of a trespass and upon conviction therefor shall be fined not more than five hundred dollars ($500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment. [Acts 1959, No. 169, § 3, p. 1007.]"

Arkansas Statutes Annotated, Vol. 6A (1967 Supp.).

In view of the fact that I would reverse on other grounds, it is not necessary to express a view as to whether the plaintiff has made a prima facie case that the discrimination is supported by state action under § 201 (b)(1) by simply showing that the defendant discriminated and that the statute explicitly gave him that right. *Cf., Adickes* v. *S. H. Kress & Company*, 252 F.Supp. 140 (S.D. N. Y. 1966). Furthermore, it is not necessary to express an opinion as to whether it is a defense to establish that the defendant would have discriminated regardless of the state statute. *Williams* v. *Hot Shoppes, Inc.*, 293 F.2d 835, 846-47 (D.C. Cir. 1961) (dissenting opinion), *cert. denied*, 370 U.S. 925 (1962).

lunch counter is operated as a separate establishment or as a part of a coordinated whole.

Mr. Chief Justice Warren, commenting on the effect of a food facility in an amusement park in *Drews* v. *Maryland*, 381 U.S. 421, 428, n. 10 (1965),[1] stated:

> "There is a restaurant at Gwynn Oak Park; indeed, petitioners were standing next to it when they were arrested. If a substantial portion of the food served in that restaurant has moved in interstate commerce,[2] the entire amusement park is a place of public accommodation under the Act. * * *"

In *Evans* v. *Laurel Links, Inc.*, 261 F.Supp. 474 (E.D. Va. 1966), the court found that a golf course was a public accommodation within the meaning of the Act because it had a lunch counter located on it. It did this even though the lunch counter accounted for only fifteen per cent of the gross receipts of the golf course. (Lunch counter receipts at Lake Nixon Club were approximately 22.8% of its gross income.)[3] In *Evans*, the court said:

> "The location of the lunch counter on the premises brings the entire golf course within the Act under 42 U.S.C. § 2000a(b)(4)(A)(ii), which provides that any

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1 For reasons hereinafter stated, it is my opinion that, in this case, commerce requirements were met by a showing that the Club served and offered to serve travelers in interstate commerce, thus I do not reach the issue of whether a substantial portion of the food moved in interstate commerce.

2 The defendant and others refused to leave an amusement park and were convicted in a Maryland State Court of disorderly conduct and disturbance of the peace. After having previously remanded the case to the State Court of Appeals, the Supreme Court dismissed a subsequent appeal and refused to grant certiorari. Mr. Chief Justice Warren, joined by Mr. Justice Douglas, dissented and would have granted certiorari. In the course of discussing the legal issues involved, the Chief Justice noted that although the 1964 Civil Rights Act was passed after the occurrence of the conduct for which the defendants were prosecuted, the Act abated the pending convictions. *Hamm* v. *Rock Hill*, 379 U.S. 306 (1964). In the course of stating that view, he made the observations quoted above.

3 In 1966, the gross income from food sales was $10,468.95, as compared with a total gross income of $46,326.

> establishment within the premises of which is located a covered establishment is a place of public accommodation. See H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964) (additional Majority Views, Hon. Robert W. Kastenmeier) U.S. Code Cong. & Admin. News, pp. 2409, 2410 (1964); Rasor, Regulation of Public Accommodations Via the Commerce Clause—The Civil Rights Act of 1964, 19 Sw.L.J. 329, 331 (1965)."

Id. at 476.

In *Adams* v. *Fazzio Real Estate Co., Inc.*, 268 F.Supp. 630 (E.D. La. 1967), the court held that the snack bar located on the premises of the bowling alley brought the entire facility under the Act. It stated:

> "The statute contains no percentage test, and it is not necessary to show that the covered establishment which magnetizes the non-covered establishment in which it is physically located occupies a majority, or even a substantial part of the premises, or that its sales are major or even a substantial part of the revenues of the establishment. * * *"

Id. at 638 (footnote omitted).

In *Scott* v. *Young*, 12 Race Rel. L. Rep. 428 (E.D. Va. 1966), the parties consented to the entry of an order providing that as long as an eating establishment was operated on the premises of a recreational facility, the entire facility would be considered a public accommodation within the meaning of the 1964 Civil Rights Act, and that the defendant would be enjoined from denying the equal use of the facility to any person on the basis of race or color.

Furthermore, House Report 914 stated that the establishments covered under § 201(b)(4) "would include, for example, retail stores which contain public lunch counters otherwise covered by Title II;"[4] and the additional views

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[4] House Report (Judiciary Committee) No. 914, 1964 *U. S. Code Cong. & Ad. News*, 2391, 2396.

As I read the District Court's decision, it avoided making a specific finding on whether the Club offered to serve interstate travelers. It did, however, state:

> "It is probably true that some out-of-state people spending time in or around Little Rock have utilized [Lake Nixon Club facilities]."

This statement, in my view, constitutes a clear and specific finding that the Club served interstate travelers and was sufficient in and of itself to satisfy the interstate commerce requirement of the Act set forth in §201(c)(2)(b).[9] Since this requirement is satisfied, the Club is covered.

While it is not necessary to find additional grounds to satisfy the commerce requirements of the Act, the record also supports the conclusion that the Club offered to serve travelers in interstate commerce: (1) the Club advertised on KALO radio on Wednesdays, Thursdays and Fridays from the last of May through the 7th of September;[10]

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9 The conclusion of the District Court draws additional support from the following facts:

(1) The defendants made no attempts to specifically exclude interstate travelers:

(a) The membership card did not require that the applicant sign his address;

(b) The advertisements did not suggest that an interstate traveler could not become a member; and

(c) There is no sign posted at the entrance which restricted the membership only to Arkansas residents.

(2) Members brought guests.

(3) Lake Nixon appears to be only about six to eight miles by road from the only federal highway between Little Rock and Hot Springs.

10 The radio copy read as follows:

"Attention . . . all members of Lake Nixon. Attention all members of Lake Nixon. In answer to your requests, Mr. Paul is happy to announce the Saturday night dances will be continued . . . this Saturday night with music by the Villagers, a great band you all know and have asked to hear again. Lake Nixon continues their policy of offering you year-round entertainment. The Villagers play for the big dance Saturday night and, of course, there's the jam session Sunday afternoon . . . also swimming, boating, and miniature golf. That's Lake Nixon. . . ."

(2) it inserted one advertisement in "Little Rock Today," a monthly magazine, indicating available attractions in the Little Rock area in the same period; (3) it inserted one advertisement in the "Little Rock Air Force Base," a monthly newspaper published at the Little Rock Air Force Base, at Jacksonville, Arkansas.

It is clear, as pointed out in the majority opinion, that the advertisements were directed to "members." It is thus argued that interstate travelers would not consider the invitation as having been addressed to them. I cannot agree. The membership idea was clearly a ruse to keep Negroes from using the Club. It was obviously understood to be such by the people living in the Little Rock area, and there is little reason to doubt that nonresidents would be less sophisticated. It also appears, from the choice of media, that the message was intended to reach nonresidents as well as local citizens. No other sound reason can be advanced for using mass media to promote "entertainment" at a "private" club.

The District Court rationalized that the Club was not a place of exhibition or entertainment as § 201(b)(3) was not intended to cover facilities where people came to enjoy themselves by swimming, golfing, boating or picnicking. It reasoned that the Act was only intended to apply to a situation "where patrons came to be edified, entertained, thrilled or amused in their capacity of spectators or listeners." While it is unnecessary to reach this issue here, the majority opinion reaches it, and thus I feel obliged to.

I cannot concur with the majority: (1) It is difficult to conclude that the Club was not a place of entertainment when the defendants characterized it in those terms in their radio advertisements: "Lake Nixon continues their policy of offering you year-round entertainment." Foot-

note 10, *supra*. See also, *Miller* v. *Amusement Enterprises, Inc.*, Civ. No. 24259 (5th Cir. April 8, 1968) (*en banc*), reversing 259 F.Supp. 523 (E.D. La. 1966). (2) It is equally difficult to conclude that the operation of the Club did not affect commerce within the meaning of § 201(c)(3), for the District Court specifically found that the juke boxes, which furnished music for dancing or listening, were manufactured outside of Arkansas, that some of the records played on them were manufactured outside of Arkansas, and that part of the other recreational equipment and apparatus (aluminum paddle boats and "Yaks"—surfboards) were brought into Arkansas from without the state. The fact that the aluminum paddle boats and the "Yaks" (surfboards) could have been manufactured in Arkansas is, in my judgment, not material when the District Court found and the record shows that they were leased and purchased[11] from an Oklahoma concern and imported into Arkansas.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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11 It appears from the record that the "Yaks" were purchased rather than leased:

"Q. Do you have any other kind of boats there?
"A. We have what we call a yak.
"Q. A yak; what's a yak?
"A. Its similar to a surfboard.
"Q. Similar to a surfboard; do you know where you purchased that?
"A. From the same company.
"Q. What company is that?
"A. Aqua Boat Company.
"Q. Who?
"A. Aqua Boat Company.
"Q. Is that a local Company?
"A. No.
"Q. Where is it?
"A. I believe they're in Oklahoma, Bartlesville."

Judgment

United States Court of Appeals
For the Eighth Circuit.

No. 18,824. September Term, 1967.

Doris Daniel and Rosalyn Kyles, Appellants,	)	
vs.	)	Appeal from the United States District Court
Buell Paull, Jr., Individually and as Owner, Manager or Operator of the Lake Nixon Club.	)	for the Eastern District of Arkansas.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Judgment of the said District Court, in this cause, be, and the same is hereby, affirmed, in accordance with majority opinion of this Court this day filed herein.

May 3, 1968.

Order Denying Rehearing

United States Court of Appeals
For the Eighth Circuit

No. 18,824.

Doris Daniel, et al.,	)	
	)	
Appellants,	)	Appeal from the
	)	United States Dis-
vs.	)	trict Court for the
	)	Eastern District
Euell Paul, Jr., etc.	)	of Arkansas.

There is before the Court appellants' petition for rehearing en banc and on consideration of such petition, It is the Order of the Court that the petition for rehearing en banc be, and it is hereby, denied.

June 10, 1968

IN THE

Supreme Court of the United States

October Term, 1968

No. 488

MRS. DORIS DANIEL and MRS. ROSALYN KYLES,

Petitioners,

—v.—

EUELL PAUL, JR., Individually and as Owner, Operator or Manager of Lake Nixon Club,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Citations to Opinions Below

The February 1, 1967 memorandum opinion of the District Court, reprinted in the Appendix at pp. 47-62, is reported at 263 F. Supp. 412. The May 3, 1968 opinion of the United States Court of Appeals for the Eighth Circuit, reprinted in the Appendix at pp. 64-82, is reported at 395 F.2d 118. The dissenting opinion of Judge Heaney, reprinted in the Appendix at pp. 82-90, is reported at 395 F.2d 127.

Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was rendered May 3, 1968. A petition for a rehearing *en banc* was denied on June 10, 1968. A petition for writ of certiorari was filed September 7, 1968 and granted December 9, 1968 (A. 105). The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1254(1).

Questions Presented

1. Lake Nixon Club is a privately owned and operated recreational area open to the white public in general. Lake Nixon has facilities for swimming, boating, picnicking, sunbathing, and miniature golf. On the premises is a snack bar principally engaged in selling food for consumption on the premises which offers to serve interstate travelers and which serves food a substantial portion of which has moved in commerce.

a) Is the snack bar a covered establishment within the contemplation of Title II of the Civil Rights Act of 1964, and if *so, does* this bring the entire recreational area within the coverage of Title II?

b) Is the Lake Nixon Club a place of entertainment within the scope of Title II?

2. Petitioners are denied admission to Lake Nixon Club solely because they are Negroes. Have petitioners been denied the same right to make and enforce contracts and have an interest in property, as is enjoyed by white citizens, in violation of the Thirteenth Amendment and an Act of Congress, 42 U. S. C. §§1981, 1982?

Constitutional and Statutory Provisions Involved

This case involves the Commerce Clause, Art. 1, §8, cl. 3, and the Thirteenth and Fourteenth Amendments of the Constitution of the United States.

This case also involves the following United States statutes:

42 U. S. C. §1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U. S. C. §1982:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U. S. C. §2000a(b):

Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

. . .

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in sell-

ing food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

42 U. S. C. §2000a(c):

The operations of an establishment affect commerce within the meaning of this subchapter if . . . (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents, films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any

State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

Statement

On July 13, 1966, petitioners, Mrs. Doris Daniel and Mrs. Rosalyn Kyles, Negro citizens of the City of Little Rock, Pulaski County, Arkansas, instituted a class action in the United States District Court for the Eastern District of Arkansas against Euell Paul, Jr., individually and as owner of Lake Nixon Club, Pulaski County, Arkansas (A. 2-3). The petitioners claimed that the Lake Nixon Club was depriving them, and Negro citizens similarly situated, of rights, privileges and immunities secured by (a) the Fourteenth Amendment to the Constitution of the United States; (b) the Commerce Clause of the Constitution; (c) Title II of the Civil Rights Act of 1964 (42 U. S. C. §2000a), providing for injunctive relief against discrimination in places of public accommodation; and (d) 42 U. S. C. §1981, providing for the equal rights of citizens and all persons within the jurisdiction of the United States (A. 2). The complaint alleged the Lake Nixon Club pursues a policy of racial discrimination in the operation of its facilities, services and accommodations; petitioners prayed for injunctive relief (A. 4-5).

On August 3, 1966, Mr. Euell Paul, Jr., answered the complaint (A. 6-7). At trial, Mrs. Paul was made a party defendant without objection (263 F. Supp. at 414). After trial without a jury, the district court, on February 1, 1967, held that the Lake Nixon Club is not a place of public accommodation within the contemplation of the Civil Rights Act and that its operations do not affect com-

merce, and dismissed the complaint with prejudice (263 F. Supp. at 420). The petitioners filed notice of appeal to the Court of Appeals for the Eighth Circuit on March 2, 1967 (A. 63).

The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court on May 3, 1968, Judge Heaney dissenting, 395 F.2d 118, 127. On June 10, 1968, petitioners' petition for rehearing was denied.

Lake Nixon Club is a recreational area comprising 232 acres (A. 41) and located about 12 miles west of Little Rock, Arkansas (Appellee's Brief in the Court of Appeals, 1). There is a State highway located 5 miles north of Lake Nixon and a U.S. highway located 5 miles to the south (Appellee's Brief in the Court of Appeals, 2).

During each season, approximately 100,000 people avail themselves of Lake Nixon's swimming, picnicking, boating, sun-bathing, and miniature golf (263 F. Supp. at 416).

At Lake Nixon there is a snack bar which sells hamburgers, hot dogs, milk and sodas for consumption on the premises (263 F. Supp. at 416). The snack bar is operated by Mrs. Paul's sister under an oral agreement whereby the parties share the profits from the snack bar (A. 32). In 1966 the gross receipts from food sales accounted for almost 23% of the total gross receipts ($10,468.95 out of a total of $46,326.00) (A. 13, 63).

The equipment of Lake Nixon includes two juke boxes manufactured out of Arkansas (263 F. Supp. at 417); 15 aluminum paddle boats leased from an Oklahoma company, and a surfboard or yak purchased from the same company (A. 28-29). The rental cost of the paddle boats is based on a percentage of the profits realized from their rental to patrons of Lake Nixon (A. 28).

Lake Nixon Club was advertised in the following media: (a) once in 1966 in *Little Rock Today,* a monthly publication distributed free of charge by Little Rock's leading hotels, chambers of commerce, motels and restaurants to their guests, newcomers and tourists; (b) once in 1966 in the Little Rock Air Force Base publication; (c) and three days each week from May through September, 1966, over radio station KALO (A. 12, 96; 263 F. Supp. at 417-418). A typical radio announcement stated:

> "Attention all members of Lake Nixon. In answer to your requests, Mr. Paul is happy to announce the Saturday night dances will be continued . . . Lake Nixon continues their policy of offering you year-round entertainment. The Villagers play for the big dance Saturday night and, of course, there's the jam session Sunday afternoon . . . also swimming, boating, and miniature golf . . ." 395 F.2d at 130, n. 10 (dissenting opinion).

On July 10, 1966, the petitioners sought admission to Lake Nixon (A. 37-38). The district court found they were refused admission because they are Negroes (263 F. Supp. at 418) and concluded Lake Nixon Club is not a private club within the contemplation of the 1964 Civil Rights Act, but is a facility open to the white public in general (263 F. Supp. at 418).

Summary of Argument

Lake Nixon Club is a 232 acre site for public amusement and recreation, located just outside of Little Rock, Arkansas, open to the white public in general but excluding blacks. In addition to such activities as swimming, boating, picnicking and miniature golf, Lake Nixon Club contains a snack bar selling food for consumption on the prem-

ises. Lake Nixon advertises its entertainment on radio and in magazines directed to tourists. Because the snack bar, which serves Lake Nixon's patrons, offers to serve interstate travelers as members of the general public and serves or sells food and other products, which have moved in commerce, the whole of Lake Nixon is subject to Title II of the 1964 Civil Rights Act.

Lake Nixon Club is also a place of entertainment affecting commerce within the scope of §201(b)(3) and (c)(3) because its patrons are entertained by the activities of others who enjoy the establishment's recreational facilities. The legislative history of Title II supports the view that Congress sought to encompass places of public amusement like recreational areas within the statute. Furthermore, Lake Nixon is subject to §201(c)(3) because it purchases and leases recreational equipment from out-of-state concerns and makes available to its patrons facilities for entertainment manufactured outside of Arkansas.

Lake Nixon is also barred from discriminating against blacks by the equal contractual and property rights guarantees of 42 U. S. C. §§1981 and 1982. These statutes, derived from the 1866 Civil Rights Act, cover the right of Negroes not to be denied the right to contract and to use property of a place of public amusement. Sections 1981 and 1982 stand independent of the provisions of Title II of the 1964 Civil Rights Act. The legislative history of §§1981 and 1982 supports the view that these statutes were designed to eradicate racial discrimination in places of public accommodation.

ARGUMENT

I.

Lake Nixon Club, a Place of Public Accommodation, Which Offers to Serve Interstate Travelers and Provides Food, Facilities for Entertainment, and Other Products Which Have Moved in Commerce, Is Barred From Excluding Petitioners by Title II of the 1964 Civil Rights Act.

For reasons stated in greater detail below, Lake Nixon Club is a place of public accommodation within the coverage of Title II of the 1964 Civil Rights Act on both of the following grounds:

1. A snack bar on the premises serves a substantial amount of food that has moved in commerce and sells or offers to sell food to all patrons of Lake Nixon, including interstate travelers. Section 201(b)(4) and (c)(4).

2. Lake Nixon is a place of entertainment customarily presenting sources of entertainment which move in commerce. Section 201(b)(3) and (c)(3).

A. *Title II of the 1964 Civil Rights Act Applies to the Whole of Lake Nixon Because of Its Lunch Counter's Operations.*

It is not disputed that Lake Nixon's snack bar is principally engaged in selling food for consumption on the premises of Lake Nixon,[1] making the snack bar subject to

[1] The district court erroneously concluded that the test under §201(b)(2) was whether the "establishment" was "'principally engaged' in the sale of food for consumption on the premises"; having concluded that Lake Nixon Club was not principally engaged in selling food, the district court held that §201(b)(2) did not apply. 263 F. Supp. at 419. The district court's holding misconstrues the language and meaning of §201(b)(2), that an estab-

§201(b)(2). Because the snack bar offers to serve interstate travelers and serves or sells food and other products which have moved in commerce, the whole of Lake Nixon is subject to §201(c)(2) and (c)(4), and thus barred from excluding patrons, as here, on racial grounds.

Lake Nixon Club offers to serve interstate travelers by the mere fact that it is open, as the district court found, to the white public in general. 263 F. Supp. at 418. Section 201(c)(2) covers an establishment if "... it serves or offers to serve interstate travelers ..." It is plain from the language that there need be no showing that interstate travellers were actually served; an offer is sufficient. *Wooten* v. *Moore*, 400 F.2d 239, 242 (4th Cir. 1968).

The district court misconceived the issue by finding no evidence that Lake Nixon "ever tried to attract interstate travelers *as such*." 263 F. Supp. at 418 (emphasis added). The Eighth Circuit compounded the error by holding, "There is no evidence that any interstate traveler ever patronized this facility, or that it offered to serve interstate travelers ..." 395 F.2d at 127. Where an establishment like Lake Nixon advertises its facilities on radio and in magazines for tourists and servicemen, charging only a token 25¢ membership fee, what is important is whether Lake Nixon *prohibits* interstate travelers from using its facilities.

Furthermore the district court, sitting near Lake Nixon in Little Rock, concluded "it is probably true that some out-of-state people" have visited Lake Nixon. 263 F. Supp. at 418. Under these circumstances, Lake Nixon

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lishment like a restaurant or a lunch counter is covered if such *eating facility* is principally engaged in selling food for consumption on its premises or on the premises, for example, of a retail establishment where the eating facility is located. *Fazzio Real Estate Co.* v. *Adams*, 396 F.2d 146, 149 (5th Cir. 1968).

offers to serve interstate travelers within the meaning of §201(c)(2). *Hamm* v. *Rock Hill*, 379 U.S. 306 (1964); *Miller* v. *Amusement Enterprises Inc.*, 394 F.2d 342 (5th Cir. *en banc*, 1968).

In the district court the owners of Lake Nixon suggested it was a private club within the exemption of §201(e). But every judge who has considered this case has found that Lake Nixon is open to members of the white race in general for profit and thus not a private club. 263 F. Supp. at 418; 395 F.2d at 123, 130.[2]

Lake Nixon is also subject to 201(c)(2) because a substantial portion of the food and other products sold at the snack bar have moved in commerce. "Substantial" means more than minimal. 395 F.2d at 124; *Gregory* v. *Meyer*, 376 F.2d 509, 511 n. 1 (5th Cir. 1967).

The only food served at the snack bar consists of hamburgers, hot dogs, soft drinks, and milk, 263 F. Supp. at 416. The district court took judicial notice that the principal ingredients of bread are produced outside of Arkansas and that some ingredients of soft drinks probably originated outside of Arkansas. 263 F. Supp. at 418. The Eighth Circuit asserted, however, that bread ingredients would not constitute a substantial portion of the food served and that the milk used was obtained in Arkansas. 395 F.2d at 124. But to ascribe to "substantial" any meaning other than "more than minimal" forces the Court and

[2] Lake Nixon contains none of the indicia of a private club such as a membership committee, self-government, ownership of assets by the membership, and social as opposed to profit-making objectives. Mr. and Mrs. Paul own Lake Nixon; they exercise their own judgment in admitting or excluding "members"; there is no list of "members" and no address required on membership cards; radio and magazine notices are given to "members" of Lake Nixon's entertainment; a nominal 25¢ fee is charged for "membership"; the Pauls operated Lake Nixon for profit. 263 F. Supp. at 416-18.

counsel to reflect on obvious facts such as hamburgers and hot dogs are served in a bun or other piece of bread. Since the snack bar sold many hamburgers and soft drinks (A. 31, 34), three of the four food items sold at the snack bar, including the two major products, contained ingredients originating outside of Arkansas. That 75% of the types of foodstuffs sold contain out-of-state ingredients would seem substantial by any reasonable test. *Katzenbach* v. *McClung*, 379 U.S. 294, 296-97 (1964) (46% is substantial); *Codogan* v. *Fox*, 266 F. Supp. 866 (M.D. Fla. 1967) (23-30% is substantial). Having established this, it seems that a more common sense approach, i.e., telling at a glance whether a more than *de minimis* test has been satisfied, is all that should be required in the interest of the policy of the law and judicial economy.

Because the snack bar is physically located within the premises of Lake Nixon and holds itself out as serving patrons of Lake Nixon, all of its facilities and privileges comprise a place of public accommodation within §201 (b)(4) and (c)(4).

Both the district court and the court of appeals held that, because the gross income from food sales constitutes a relatively small percentage of the total gross income (23%) and the sale of food is merely an adjunct to the Pauls' principal purpose of providing recreational facilities, Lake Nixon is a single unit operation and not covered by §201 (b)(4). Apparently the Eighth Circuit requires for coverage under Title II at least two establishments under separate ownership: See 395 F.2d at 123. This holding is in conflict with the decision of every other court which has considered this subsection.

In *Fazzio Real Estate Co.* v. *Adams*, 396 F.2d 146 (5th Cir. 1968), the court held that where the operators of a bowling alley also operated a snack bar for the patrons

of the bowling alley, the entire establishment was covered by this subsection. Income from the sale of food and beer in *Fazzio* represented 23% of the total gross income; income from the sale of food alone represented 8 to 11% of the total gross income. The court held that even 8 to 11% could not be considered insignificant and explicitly rejected the substantial business purpose test of the Eighth Circuit, *compare* 396 F.2d at 150 *with* 395 F.2d at 123. The Fifth Circuit stated, 396 F.2d at 149:

> The Act contemplates that the term "establishment" refers to any separately identifiable business operation without regard to whether that operation is carried on in conjunction with other service or retail sales operations and without regard to questions concerning ownership, management or control of such operations.[3]

Even under its own rule that Title II covers only separately managed but physically connected establishments, the Eighth Circuit erred in failing to find the snack bar's operations made Lake Nixon a public accommodation within the coverage of Title II. The evidence is that the snack bar is a separate enterprise managed by Mrs. Paul's sister pursuant to an oral contract whereby the Pauls and Mrs. Paul's sister share the profits from food sales.

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[3] In *Evans* v. *Laurel Links, Inc.*, 261 F. Supp. 474 (E.D. Va. 1966), the court held an entire golf course within the coverage of Title II, because the operators of the golf course maintained a lunch counter for the patrons of the course. Income from food sales constituted 15% of the total gross income of the golf course. See also *Hamm* v. *Rock Hill*, 379 U.S. 306 (1964); *Scott* v. *Young*, 12 Race Rel. L. Rep. 428 (E.D. Va. 1966) (recreational area with snack bar). The legislative history supports the majority rule. The Report of the House Judiciary Committee states that subsection (b)(4) "would include, for example, retail stores which contain public lunch counters otherwise covered by Title II". H. R. Rep. No. 914, 88th Cong., 1st Sess. 20 (1963).

B. *Lake Nixon Is a Place of Entertainment As Defined by Title II of the 1964 Civil Rights Act.*

Lake Nixon also is a place of entertainment within the contemplation of Title II and we submit that this Court should so hold. The snack bar might be eliminated for the purpose of removing Lake Nixon from Title II coverage and then further litigation would be necessary to determine whether it is a place of entertainment. This possibility is not fanciful: in a companion case involving a similar recreational area, all sales of food were discontinued after petitioners instituted an action under Title II, 263 F. Supp. at 417. In addition, the conflict between the Eighth Circuit's construction of "place of entertainment" and that of the Fifth Circuit in *Miller* v. *Amusement Enterprises, Inc.*, 394 F.2d 342 (5th Cir. *en banc*, 1968), should be resolved by this Court.

The Eighth Circuit held Lake Nixon was not a "place of entertainment", because the Court found a total lack of evidence that its activities or entertainment moved in commerce, 395 F.2d at 125. The district court, defining "place of entertainment" to mean an establishment where the patrons are spectators or listeners and their physical participation is non-existent or minimal, held that Lake Nixon is not within this definition (263 F. Supp. at 419).

In *Miller* v. *Amusement Enterprises, Inc., supra*, the Court of Appeals for the Fifth Circuit, sitting *en banc*, overruled the prior decision of a three-judge panel (reported at 391 F.2d 86), and held that Fun Fair amusement park in Baton Rouge, La., is a place of entertainment within the coverage of Title II. Noting that it was not necessary to its decision, the Court held that even under a narrow construction of "place of entertainment" to include only places which present exhibitions for spectators, Fun

Fair is a covered establishment because "many of the people who assemble at the park come there to be entertained by watching others, particularly their own children, participate in the activities available", 394 F.2d at 348. Swimming, boating, picnicking, sun-bathing and dancing at Lake Nixon are certainly as much, if not more, spectator activities as ice-skating and "kiddie rides" at Fun Fair, see 394 F.2d at 348.

The overriding purpose of Title II was to eliminate discrimination in those facilities which were the focal point of civil rights demonstrations. *Hearings on H. R. 7152 Before the House Comm. on the Judiciary,* 88th Cong., 1st Sess., ser. 4, pt. 4, at 2655 (1963) (Testimony of Attorney Gen'l Kennedy). President Kennedy clearly intended that recreational areas and other places of amusement be covered. *Hearings on Miscellaneous Proposals Regarding Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 88th Cong., 1st Sess., ser. 4, pt. 4, at 1448-1449, 2655 (1963). Facilities which were the focal point of demonstrations were consistently identified in both the Senate and House hearings as lodging houses, eating places, and places of amusement or recreation. 110 Cong. Rec. 7383 (1964) (Remarks of Sen. Young). While the Senate was debating the Act, there were demonstrations at the Gwynn Oak Amusement Park in Maryland; Senator Humphrey stated that this was proof of the need for this Act. 109 Cong. Rec. 12276 (1963).

Under either a narrow or a liberal construction of "place of entertainment", coverage depends on whether Lake Nixon customarily presents sources of entertainment which move in commerce. The Eighth Circuit could not discern any evidence that any source of entertainment customarily presented by Lake Nixon moved in interstate commerce, 395 F.2d at 125.

In fact, "sources of entertainment" were intended to include equipment. In a discussion of §201(c)(3), Senator Magnuson, floor manager of Title II, pointed out that "establishments which receive *supplies, equipment* or goods through the channels of interstate commerce . . . narrow their potential markets by artificially restricting their patrons to non-Negroes, the volume of sales and therefore, the volume of interstate purchases will be less," 110 Cong. Rec. 7402 (1964) (emphasis added). In the discussion of the demonstration at the Gwynn Oak Amusement Park, Senator Humphrey believed that the park would be covered by the Act in part because he was "confident that merchandise and facilities used in the park were transported across State lines," 109 Cong. Rec. 12276 (1963).

Lake Nixon purchases and leases its boats from an Oklahoma company. The Pauls rent two juke boxes which were manufactured outside Arkansas and which play records manufactured outside Arkansas. In view of these facts the Eighth Circuit is in direct conflict with Fifth Circuit's decision in *Miller*. The *Miller* Court relied in part on the fact that 10 of the 11 "kiddie rides" at the park were purchased from out of state, 394 F.2d at 351, to find an effect on commerce. But the Court also concluded that even under a narrow construction of the Act, since Fun Fair is located on a major highway and does not geographically restrict its advertising, the logical conclusion is that a number of the patrons, whose activities may entertain, have moved in commerce, 394 F.2d at 349. The same circumstances which make it reasonable to assume that some interstate travelers will accept Lake Nixon's offer to serve the general public make it reasonable to assume that some of Lake Nixon's patrons have moved in commerce.

The Eighth and Fifth Circuits are also in conflict as to the meaning of "move in commerce". The district court

found that Lake Nixon's operations do not affect commerce on the ground that, although the boats, juke boxes and records have moved in commerce, they do not now move, 263 F. Supp. at 420. The court concluded that because the phrase, "has moved", appears in the section concerning eating facilities, Congress must have intended to limit the section concerning places of entertainment to sources which "move", and therefore sources of entertainment which have but no longer move, are not covered, 263 F. Supp. at 420. The Fifth Circuit, on the other hand, expressly concluded in *Miller* that Congressional use of the present tense of "move" was not intended to exclude other tenses, 394 F.2d at 351-52.

The legislative history supports the conclusion of the Fifth Circuit. The Report of the Senate Committee on Commerce refers within a single paragraph to "sources of entertainment which move in interstate commerce" and "entertainment that has moved in interstate commerce", as within the contemplation of §201(c)(3). *S. Rep. No. 872 on S. 1732*, 88th Cong., 2nd Sess. 3 (1964). See also 110 Cong. Rec. 6557 (1964) (remarks of Sen. Kuchel). In addition, a proposal to amend §201(c)(3) to read "sources of entertainment which move in commerce and have not come to rest within a state" was rejected. 110 Cong. Rec. 13915, 13921 (1964). The subsequent debate indicates that Congress intended the bill to reach businesses which individually had a minimal or insignificant impact on interstate commerce. 110 Cong. Rec. 13924 (1964).

II.

The Equal Right to Make and Enforce Contracts and to Have an Interest in Property, Guaranteed by 42 U.S.C. §§1981 and 1982, Includes the Right of Negroes to Have Access to a Place of Public Amusement.

The first sentence of the Civil Rights Act of 1866, enacted pursuant to the Thirteenth Amendment, provided, *inter alia*, for citizens to have the same right to make and enforce contracts and have an interest in property as is enjoyed by white citizens. These rights are now embodied in 42 U. S. C. §§1981 and 1982. Negro petitioners have been denied these rights because the Pauls barred them from becoming 25¢ "members" of Lake Nixon solely on racial grounds. The Lake Nixon membership fee is in effect a contract, like the purchase of a ticket, entitling one to use, for a time, the real and personal property on Lake Nixon's 232 acres. See *Griffin* v. *Southland Racing Corp.*, 236 Ark. 872, 370 S.W.2d 429 (1963); *Vallee* v. *Stengel*, 176 F.2d 697 (3rd Cir. 1949). Denial of these contractual and property rights on racial grounds violates rights secured by the 1866 Civil Rights Act. See *Jones* v. *Mayer Co.*, 392 U.S. 409, 426, 436, 439-41 (1968). As this Court held just last term, "At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the *freedom to buy whatever a white man can buy . . .*" *Jones* v. *Mayer Co.*, *supra*, 392 U.S. at 443 (emphasis added). Neither of the courts below considered the applicability of *Jones* since it was decided subsequent to the Eighth Circuit's denial of rehearing.

For reasons essentially similar to those holding §1982 independent of the Civil Rights Act of 1968, 42 U. S. C. §§3601-3631—the principal reasons being differences in coverage between the two statutes and no Congressional pur-

pose to limit §1982—petitioners submit that §§1981 and 1982 provide rights independent of Title II of the 1964 Civil Rights Act, 42 U. S. C. §2000a.[4] See *Jones* v. *Mayer Co., supra,* 392 U.S. at 413-17. Where racial discrimination between blacks and whites is alleged, the great advantage of applying the sweeping and unambiguous language of §§1981, 1982 is that no complex statutory tests for coverage need be applied as in the case of Title II of the 1964 Civil Rights Act.[5]

In this case a threshold question on the applicability of §§1981 and 1982 is whether these statutes are properly before the Court. Section 1981, guaranteeing equal contractual rights, was specifically pleaded in the complaint (A. 2, 5), and thus its applicability is properly to be determined. Section 1982 was not pleaded below but this does not bar petitioners from relying on it here because this Court has made clear that the "mere failure" to raise a constitutional or statutory question "prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground" *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 142-143 (1967); *Thorpe* v. *Housing Authority,* 37 U.S.L.W. 4068, 4072 and

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[4] Among other points of difference between §§1981, 1982 and Title II are these: (a) Sections 1981, 1982 contain no exceptions whereas Title II covers only places of public accommodation affecting commerce as defined; (b) Title II prohibits discrimination based on religion and national origin whereas §§1981, 1982 prohibit only treatment different from *white citizens;* (c) Title II makes no distinction between citizens and persons—all are entitled to be free from discrimination, whereas §1982 guarantees to *citizens* property rights equal to white citizens. No intent to modify §§1981 or 1982 could be found in the legislative history of Title II.

[5] Much litigation has concerned simply Title II's requirement of "affecting commerce." See *e.g., Fazzio Real Estate Co.* v. *Adams,* 396 F.2d 146 (5th Cir. 1968); *Newman* v. *Piggie Park Enterprises, Inc.,* 256 F. Supp. 941 (D.S.C. 1966), *rev'd,* 377 F.2d 433 (4th Cir. 1967), *mod. and aff'd on oth. gds.,* 390 U.S. 400 (1968).

accompanying notes (U.S. Jan. 13, 1969). Furthermore, this precise issue was before this Court last term in *Sullivan* v. *Little Hunting Park*, 392 U.S. 657 (1968) where this Court vacated the judgment of the Virginia Supreme Court of Appeals and remanded the case for further consideration in light of *Jones* v. *Mayer Co.*, *supra*, even though the *Sullivan* petitioners did not rely on §1982 in the Virginia courts.

This case, involving as it does the contractual and property rights of blacks to use Lake Nixon Club is, therefore, controlled by the language of §§1981 and 1982 requiring equal rights. Any intimation to the contrary in the *Civil Rights Cases*, 109 U.S. 3, 16-18 (1883) has been superseded by the approval on Thirteenth Amendment grounds of the 1866 Act in *Jones*, 392 U.S. at 426, 436, 439-41. This Court's holding in *Jones* and the legislative history of the 1866 Act, from which §§1981 and 1982 are derived,[6] demonstrate a

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[6] Much of the legislative history of the 1866 Civil Rights Act which this Court found persuasive in *Jones* is applicable here to show that the Act was intended to make blacks the *practical* equal of whites. 392 U.S. at 420-40 and accompanying notes. The sponsor of the 1866 Act, Senator Trumbull, repeatedly affirmed the Act's intention to give blacks the rights to go or come at pleasure and to buy and sell without discrimination. Cong. Globe, 39th Cong., 1st Sess. 43, 322, 475, 599. The opponents of the Act and its companion bill, the Freemen's Bureau Bill, pointed out the Act would permit commingling of whites and blacks in hotels, theaters and public conveyances. Cong. Globe, 39th Cong., 1st Sess. at 541 (remarks of Rep. Dawson); *id.* at Appendix 183, 936 (remarks of Sen. Davis); *id.* at Appendix 69 (remarks of Rep. Rousseau). No one disputed this view. Furthermore, in the early years following the Act's passage, the common view of its friends and enemies that it applied to public accommodations and conveyances was generally accepted by various courts. H. Flack, *The Adoption of Fourteenth Amendment* 46-47, 52-54 (1908); *Coger* v. *The North West Union Packet Co.*, 37 Iowa 145, 153-54 (1873). Cf. "That the [1866 Civil Rights] bill would indeed have so sweeping an effect [in breaking down all discrimination between whites and blacks] was seen as its great virtue by its friends and as its great danger by its enemies but was disputed by none." *Jones* v. *Mayer Co.*, *supra*, 392 U.S. at 433 (footnotes omitted).

Congressional purpose to outlaw racial discrimination where, as here, access to public accommodations concerns rights of contract and property.

CONCLUSION

For the foregoing reasons the judgment below should be reversed or, in the alternative, reversed and remanded for reconsideration in light of *Jones* v. *Mayer Co.*, 392 U.S. 409 (1968).

Respectfully submitted,

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Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 488

MRS. DORIS DANIEL AND MRS. ROSALYN KYLES,
PETITIONERS

v.

EUELL PAUL, JR., INDIVIDUALLY AND AS OWNER, OPERATOR OR MANAGER OF LAKE NIXON CLUB

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the district court (A. 47–62) is reported at 263 F. Supp. 412. The majority and dissenting opinions of the court of appeals (A. 64–90) are reported at 395 F. 2d 118.

JURISDICTION

The judgment of the court of appeals (A. 91) was entered on May 3, 1968. A petition for rehearing *en banc* (A. 92–102) was denied on June 10, 1968 (A. 103). The petition for a writ of certiorari was filed on September 7, 1968, and granted on December 9, 1968 (A. 105). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 42 U.S.C. 1981 and 1982 guarantee to Negroes the right to purchase admission to a privately owned place of amusement, such as the Lake Nixon Club, which is open to white members of the general public.

2. Whether the Lake Nixon Club is subject to the proscriptions of Title II of the Civil Rights Act of 1964 under Section 201(b)(4) of the Act (42 U.S.C. 2000a(b)(4)) by reason of the operation on its premises of an eating facility which is itself covered under Section 201(b)(2) of the Act (42 U.S.C. 2000a(b)(2)).

3. Whether the Lake Nixon Club is a "place of * * * entertainment" within the meaning of Section 201(b)(3) of the Civil Rights Act of 1964 (42 U.S.C. 2000a(b)(3)) and is thereby subject to the proscription of Title II of the Act.

STATUTORY PROVISIONS INVOLVED

Sections 1981 and 1982 of Title 42 of the United States Code provide in pertinent part:

> § 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens * * *.
>
> § 1982. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

The relevant provisions of Title II of the Civil Rights Act of 1964 (42 U.S.C. 2000 *et seq.*) are as follows:

> § 201(a) (42 U.S.C. 2000a(a)). All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> § 201(b) (42 U.S.C. 2000a(b)). Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce * * *:
>
> * * * * *
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises * * *;
>
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
>
> (4) any establishment (A) * * * (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.
>
> § 201(c) (42 U.S.C. 2000a(c)). The operations of an establishment affect commerce with-

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in the meaning of this title if * * * (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves * * * has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) * * * there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States * * *.

STATEMENT

Lake Nixon Club is a privately owned place of amusement located about 12 miles west of Little Rock, Arkansas. Approximately 100,000 persons patronize Lake Nixon each year (A. 43). The entire establishment contains about 230 acres and includes facilities for swimming, boating, picknicking, sun bathing, miniature golf, and dancing (A. 28–30, 41). For the convenience of its patrons, Lake Nixon also maintains a snack bar on the premises which sells hamburgers, hot dogs, soft drinks, and milk purchased from local suppliers (A. 12–13, 30–32; see note 12, *infra*). Gross income from the sale of food was approximately $10,500 during the 1966 sea-

son, or about 23 percent of the total revenue for the entire establishment (A. 13, 63).

The district court took judicial notice of the fact that at least some of the ingredients of the bread products and soft drinks sold at Lake Nixon had moved in interstate commerce (A. 57). Fifteen paddle boats which were used on the Lake were rented on a royalty basis from an Oklahoma company (A. 28–29), and two juke boxes maintained on the premises were manufactured outside Arkansas (A. 62). Lake Nixon was advertised over a local radio station and in a monthly publication, designed to reach tourists and visitors, which listed available attractions in the Little Rock area (A. 55–56, see p. 32, *infra*). The district court found that although it is unlikely that an interstate traveler would break his trip to visit Lake Nixon, "it is probably true that some out-of-state people spending time in or around Little Rock" have patronized Lake Nixon (A. 56–57).

Lake Nixon has been operated as a racially segregated facility at least since respondent Euell Paul, Jr., and his wife purchased it in 1962 (A. 15, 41). Following the enactment of the 1964 Civil Rights Act, the Pauls began to refer to their establishment as a "private club" (A. 54). Patrons have thereafter been required to pay a 25-cent "membership" fee, which entitles them to enter the premises for an entire season, and, on payment of certain additional fees, to use the swimming, boating, and miniature golf facilities (A. 27–28). Although white persons are routinely admitted to membership in the Lake Nixon Club,

Negroes are uniformly denied membership or admission, because respondent feared that "business would be ruined" (A. 16, 44).

Petitioners, Mrs. Doris Daniel and Mrs. Rosalyn Kyles attempted to use the facilities of Lake Nixon on July 10, 1966, but were denied admission because they are Negroes (A. 37, 44). Petitioners thereafter instituted this class action against respondent, alleging that his policy of refusing Negroes admission to Lake Nixon was in violation of Title II of the Civil Rights Act of 1964 and of 42 U.S.C. 1981. In their complaint petitioners prayed for an injunction requiring respondent to abandon the recially discriminatory admission policy at Lake Nixon (A. 5).

Although finding that Lake Nixon was not a "private club" within the exemption for such facilities under Section 201(e) of the 1964 Civil Rights Act, the district court denied relief, holding that the Lake Nixon Club was not a covered establishment under either Section 201(b)(3) or 201(b)(4) of the Act (A. 57–62). A divided court of appeals affirmed on the ground that the evidence in the record failed to establish any connection between Lake Nixon and interstate commerce as required by the 1964 Act (A. 78). Neither the district court nor the court of appeals dealt with petitioners' claim under 42 U.S.C. 1981.

ARGUMENT

Summary and Introduction

The central issue in this case is whether an amusement facility open to the general public, may, consonant with the provisions of the Civil Rights Acts

of 1866 and 1964, exclude Negroes solely on the basis of their race. Our submission is that it may not, because the two statutes, sometimes overlapping, but complementary, combine to outlaw all such discrimination.

1. In 1866, Senator Trumbull of Illinois, Chairman of the Senate Judiciary Committee, dealing with one of the problems which confronted the "Reconstruction" Congress, spoke of the need to guarantee to the former Negro slaves, whose freedom had just been secured by the Thirteenth Amendment, the right "to make contracts and enforce contracts." Cong. Globe, 39th Cong., 1st Sess., 43. He described the bill he introduced on January 5, 1866—which later became the Civil Rights Act of 1866—as a measure designed affirmatively to secure for all men what he termed the "great fundamental rights," including the right "to make contracts" (*id.* at 475). With reference to the rights enumerated in the proposed legislation, the Senator said the bill would "break down all discrimination between black men and white men" (*id.* at 599). Speaking for this Court in 1968, Mr. Justice Stewart said that, indeed, the 1866 Act "was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute * * *." *Jones* v. *Mayer Co.*, 392 U.S. 409, 426. We submit that the right to purchase entry to, and to enjoy the benefits of, a place of public amusement is among the rights protected by the statute. (*Infra*, pp. 9–27.)

2. Addressing the Congress 97 years after Senator Trumbull, President Kennedy, in his message of February 28, 1963, said (109 Cong. Rec. 3248, emphasis added):

> No action is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a Negro citizen who seeks only equal treatment—than the barring of that citizen from * * * *recreational areas*, and other public accommodations and facilities.

To correct this injustice the President called for legislation "to secure the right of all citizens to the full enjoyment of all facilities which are open to the general public." (Hearings on Civil Rights before Subcommittee No. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess., Part II, p. 1448 (Message of June 19, 1963)).

During the deliberations on the Administration's proposals, Representative Celler told the House Rules Committee that Title II "seeks to remove the daily affront and humiliation occasioned by discriminatory denials of access to facilities open to the general public." Hearings on H.R. 7152 before the House Committee on Rules, 88th Cong., 2d Sess., p. 91. In the Senate, Senator Humphrey told his colleagues (110 Cong. Rec. 6533):

> The grievances which most often have led to protest and demonstrations by Negro Americans are the segregation and discrimination they encounter in the commonly used and necessary places of public accommodation * * *. No amount of oratory and quibbling can obscure the personal hardships and insults which are produced by discriminatory practices in these places. * * *
>
> * * * We must make certain that every door in our public places of amusement and culture is open to men of black skin as well as white.

> In sum, we must put an end to the shabby treatment of the Negro in public places which demeans him and debases the value of his American citizenship.

Title II of the 1964 Act, as finally passed, though not unlimited in its coverage, was a "most comprehensive" measure designed to achieve that end. See *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 246; *Miller* v. *Amusement Enterprises, Inc.*, 394 F. 2d 342, 349, 352–353 (C.A. 5) (*en banc*); *Nesmith* v. *YMCA of Raleigh*, 397 F. 2d 96, 100 (C.A. 4). We believe it, too, encompasses the facility in suit. (*Infra*, pp. 27–40.)

I. RACIAL DISCRIMINATION IN THE SALE OF ADMISSIONS TO THE LAKE NIXON CLUB VIOLATES SECTION 1 OF THE CIVIL RIGHTS ACT OF 1866 (NOW 42 U.S.C. 1981, 1982)

A. SECTION 1981, ON ITS FACE, BARS RESPONDENT'S CONDUCT

Petitioners alleged in their complaint that respondent's refusal to admit them, by reason of their race, into membership in the Lake Nixon Club and to use its facilities deprived them of rights secured by 42 U.S.C. 1981, which provides, in pertinent part, that "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens * * *." We agree.

Whatever doubts may once have surrounded this provision were settled by this Court's decision, last Term, in *Jones* v. *Mayer Co.*, 392 U.S. 409, construing 42 U.S.C. 1982. Since both Section 1981 and Section 1982

derive from a single clause of Section 1 of the Civil Rights Act of 1866 (14 Stat. 27),[1] it seems evident the two provisions must be given comparable scope. Thus, like the right to "purchase [and] lease * * * real and personal property," the right to "make and enforce contracts" without discrimination on the basis of race is not limited to the legal capacity to engage in commercial transactions free from hostile state action. It, too, is an every-day right to equality of opportunity in business dealings—the "same right" as is enjoyed by white citizens—which the 1866 Act

[1] Section 1 of the Act of 1866 read as follows:

"That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The "property" clause became separated when the rest of the provision, slightly expanded and made applicable to resident aliens as well, was re-enacted in *haec verba* as Section 16 of the Enforcement Act of May 31, 1870 (16 Stat. 140, 144). The property guarantee remained available to citizens alone as part of the 1866 Act, the whole of which was re-enacted (by reference only) by Section 18 of the Enforcement Act of 1870. This division was formalized in the Revised Statutes of 1874, the "property clause" being codified as Section 1978, the rest as Section 1977, and persists today in Sections 1982 and 1981 of Title 42 of the United States Code.

secures against racial discrimination by private persons as well as public authorities (392 U.S. at 421–424). Here, also, Congress meant exactly what it said—that it intended "to prohibit *all* racially motivated deprivations of the rights enumerated in the statute * * *" (*id.* at 426, 436). And it would seem equally to follow that "the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment" (*id.* at 413). See discussion *infra*, pp. 19–21.

On its face, therefore, Section 1981 prohibits all private, racially motivated conduct which denies or interferes with the Negroes' right to enter into contracts to purchase that which is freely sold to white citizens. That membership in the Lake Nixon Club is a contractual relationship can hardly be denied. The record indicates that upon payment of the admittedly small membership fee, white persons (thereafter "members") obtained the right for the remainder of the season to enter onto the premises at no additional charge and, on payment of additional fees, to make use of Lake Nixon's amusement and entertainment facilities (A. 27–28). Even if the "membership" fee entitled a patron to admission on only one occasion, it is clear that under common law principles a ticket to a place of entertainment or recreation is regarded as a contract. *Watkins* v. *Oaklawn Jockey Club*, 86 F. Supp. 1006, 1016 (W.D. Ark.), affirmed, 183 F. 2d 440 (C.A. 8); *Williams* v. *Kansas City, Missouri*, 104 F. Supp. 848, 859 (W.D. Mo.), affirmed, 205 F. 2d 47, 51 (C.A. 8), certiorari denied, 346 U.S. 826. As Mr. Justice Holmes said in *Marrone* v. *Washington*

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Jockey Club, 227 U.S. 633, 636, with reference to a ticket of admission to a race track, "the purchase of the ticket made a contract" and gave rise to a right "to sue upon the contract for the breach."[2]

It is of course unnecessary to decide here whether every transaction or relationship which could formally be characterized as "contractual" brings Section 1981 into play. Thus, it may well be that membership in a *bona fide* private club—not involved here (see p. 6, *supra*, and n. 10, *infra*)—and other purely social or personal arrangements are beyond the intended reach of the statute. Our present submission is only that ordinary commercial contracts are covered, including those relating to privately-owned places of *public* accommodation, which—except for the race barrier—admit all persons indiscriminately.

Indeed, that was the holding of *Valle* v. *Stengel*, 176 F. 2d 697 (C.A. 3), in which the plaintiffs sought damages and injunctive relief, alleging that certain individuals and police officers had discriminatorily refused to admit them to the swimming pool of an

[2] We do not consider whether an admission ticket is viewed as a contract under Arkansas law. In light of *Jones*, the federal courts will be called upon to develop a body of law as to what, for example, constitutes "property" under Section 1982 and "contracts" under Section 1981. That determination should not be made subject to the laws of the 50 State jurisdictions. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, notwithstanding, it is clear that in order that there be uniformity in the disposition of such matters as are within the area of federal legislative jurisdiction, the federal courts are authorized to develop federal law. *E.g.*, *Clearfield Trust Co.* v. *United States*, 318 U.S. 363; *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457; *Howard* v. *Lyons*, 360 U.S. 593, 597. See also *United States* v. *Standard Oil Co.*, 332 U.S. 301, 307.

amusement park in violation of rights secured to them by 42 U.S.C. 1981, 1982,[3] and the Fourteenth Amendment.[4] In reversing the district court's dismissal of the complaint (75 F. Supp. 543 (D. N.J.)), the court of appeals said (176 F. 2d at 702 (emphasis supplied.)):

> [Plaintiffs] were ejected from the park, were assaulted and were imprisoned falsely, as alleged in the complaint, because they were Negroes or were in association with Negroes, and *were denied the right to make or enforce contracts, all within the purview of and prohibited by the provisions of R. S. Section 1977* [42 U.S.C. 1981].

Here white members of the general public were allowed to make contracts giving them the right to enter and use Lake Nixon's facilities, while petitioners, Negroes, were denied that right. We believe that conduct constitutes a violation of Section 1981.

B. SECTION 1982, ON ITS FACE, ALSO BARS RESPONDENT'S CONDUCT

Although, in our view, the case is clearly embraced by Section 1981, we believe respondent's conduct also violates 42 U.S.C. 1982—the provision construed in *Jones* v. *Mayer Co., supra,* which guarantees all citizens, regardless of race, "the same right * * * to * * * purchase, lease * * * [and] hold * * * real

[3] Then 8 U.S.C. 41 and 42; Sections 1977 and 1978 of the Revised Statutes.

[4] Both the amusement park and the swimming pool located therein were private facilities open to the public upon the payment of an admission fee. Plaintiffs, Negroes and their companions, alleged that, although they were admitted to the park, they were denied entry to the swimming pool because of the application of a "white only" admission policy.

and personal property."[5] Indeed, nominal as it may be, the membership fee in Lake Nixon Club entitles the patron to enjoy the real and personal property of the facility. Whether the benefit is viewed as a kind of temporary lease or right of use appertaining to those properties, or as a species of incorporeal personalty, the transaction involves a "purchase."

We do not press the point. Our submission is simply that the case is covered by Section 1981 *or* Section 1982, if not both. Whatever may be the most appropriate characterization of the right to enjoy the benefits of the Lake Nixon facility, we have no doubt that a Negro who is excluded by reason of his race has suffered a loss of the freedom from racial discrimination secured by Section 1 of the Civil Rights Act of 1866. As the Court said in *Jones* (392 U.S. at 443), the Congress which acted to secure the Negroes' freedom under the Thirteenth Amendment to "go and come at pleasure" and to "buy and sell when they please" did exactly what it intended to do—"to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man."

C. SUBSEQUENT ENACTMENT OF A PUBLIC ACCOMMODATIONS LAW IN 1875 DOES NOT INDICATE THAT THE RIGHTS CLAIMED HERE WERE BEYOND THE SCOPE OF THE 1866 LEGISLATION

What has been said sufficiently shows that the Civil Rights Act of 1866, on its face, reaches the discrim-

[5] Although petitioners did not plead 42 U.S.C. 1982 as a ground for relief, the Court may consider issues arising under that provision, *Curtis Publishing Company* v. *Butts*, 388 U.S. 130, 142–143; *Sullivan* v. *Little Hunting Park*, 392 U.S. 657, and decide the case on that basis. See *United States* v. *Schooner Peggy*, 1 Cranch 103, 110; cf. *Hamm* v. *City of Rock Hill*, 379 U.S. 306.

inatory policy of the Lake Nixon Club—whether under the "contract" clause of Section 1981 or the "property" clause of Section 1982. However, because we are dealing with a "place of public accommodation," which was the special subject-matter of the Civil Rights Act of 1875* (18 Stat. 335), held unconstitutional in the *Civil Rights Cases,* 109 U.S. 3, the question arises whether the right to equal enjoyment of such facilities must be deemed excepted from the coverage of the 1866 Act.

1. At the outset, we stress that there can be little doubt that the draftsmen of the 1866 Act believed they were reaching places of public accommodation. The 39th Congress, which passed the First Civil Rights Act and framed the Fourteenth Amendment, legislated against a background of common law rules affording members of the public not suffering from racial disability a legal right to use public conveyances and to obtain service in inns and hotels. See, *e.g.,* Frank and Munro; *The Original Understanding of "Equal Protection of the Laws,"* 50 Colum. L. Rev. 131, 149–153; *Civil Rights Cases,* 109 U.S. 3, 37–43 (Harlan J., dissenting); *Bell* v. *Maryland,* 378 U.S. 226, 295–299 (Goldberg, J., concurring). Accordingly, it may be supposed that the declaration of citizenship and of the right to make and enforce contracts in Section 1 of the Civil Rights Act was meant, at the least, to confer on Negroes the "same

*In speaking of the Civil Rights Act of 1875 we refer to Sections 1 and 2, which dealt exclusively with places of public accommodation. Section 4 of the Act, outlawing racial discrimination in jury selection, was vindicated in *Ex Parte Virginia,* 100 U.S. 339, and is today codified as 18 U.S.C. 243. Sections 3 and 5 were jurisdictional provisions, presumably applicable to the whole of the Act.

right" to the services of public accommodations as white citizens had enjoyed. Compare *Ferguson* v. *Gies*, 82 Mich. 358, 365; *Donnell* v. *State*, 48 Miss. 661. Indeed, opponents of the Freedmen's Bureau bill and the Civil Rights Act argued, without contradiction, that those measures would afford Negroes the right to equal treatment in places of public accommodation. See Cong. Globe, 39th Cong., 1st Sess., 541, 936; *id.* App. 70, 183 (Representatives Dawson and Rousseau, Senator Davis); *Jones* v. *Mayer Co.*, *supra*, 392 U.S. at 433, 435 n. 68. Presumably, the proponents of the Act offered no denial because they recognized that this was, indeed, one inevitable consequence of granting Negroes equality before the law, even in the narrowest sense. See *Coger* v. *North West. Union Packet Co.*, 37 Iowa 145 (1873); Flack, *The Adoption of the Fourteenth Amendment* 11–54 (1908). See also Supplemental Brief for the United States as *Amicus Curiae*, Nos. 6, 9, 10, 12, and 60, O.T. 1963, pp. 119–130.

This reach of the 1866 Act was made clearer by the re-enactment of the measure in 1870, after the adoption of the Fourteenth Amendment, which had confirmed the grant of citizenship to Negroes and explicitly guaranteed "equal protection of the laws." See *Jones* v. *Mayer Co.*, *supra*, 392 U.S. at 436–437. That understanding is reflected in the protracted congressional debates on the proposals which culminated in the Civil Rights Act of 1875, debates premised on the same concept of "civil" rights which underlay the declaration of rights in the 1866 Act. See Cong. Globe, 42d Cong., 2d Sess., pp. 381–383 (Senator Sumner); Gressman, *The Unhappy History of Civil*

Rights Legislation, 50 Mich. L. Rev. 1323–1336. There was, indeed, specific reference to an existing duty to afford Negroes equal treatment in places of public accommodation. As the Chairman of the House Judiciary Committee, Representative Butler of Massachusetts, told his colleagues, the bill which ultimately was enacted as the Civil Rights Act of 1875[1]—

> * * * gives to no man any rights which he has not by law now, unless some hostile State statute has been enacted against him. He has no right by this bill except what * * * every man * * * has by the common law and civil law of the country.

2. The question remains: If freedom from racial discrimination in places of public accommodation was already a federal right—secured by the Civil Rights Act of 1866, re-enacted in 1870—why then did Congress address itself to the subject again in 1875?

We might simply offer the short answer given for the Court by Mr. Justice Holmes in *United States* v. *Mosley*, 238 U.S. 383, 387, rejecting the argument that 18 U.S.C. 241 should not be read as reaching interference with voting rights because they were specifically dealt with elsewhere: "Any overlapping that there may have been well might have escaped attention, or if noticed have been approved." Redundancy is not rare in legislation of the period. See, *e.g.*, the overlap of Sections 241 and 242 of the Criminal Code as applied to rights protected by the Fourteenth Amendment, noticed in *United States* v. *Williams*, 341 U.S. 70, 78 (opinion of Frankfurter, J.), 88 n. 2 (opinion of Douglas, J.), and condoned in *United States* v.

[1] 2 Cong. Rec. 340.

Price, 383 U.S. 787, 800–806, 802 n. 11. This may be no more than another instance of duplication. But there is another explanation for the Civil Rights of 1875.

It is most likely, we think, that the 1875 law was enacted not to afford a new guarantee of equality in public accommodations, but to provide a more effective means, through federal enforcement, of vindicating rights which already had been recognized. The 1866 law provided no specific civil remedy for violation of the rights enumerated in Section 1, and its criminal provisions were applicable only to conduct done "under color of law." See Section 2 of the Act, now 18 U.S.C. 242. Negroes who were denied equal treatment in places of public accommodation were thus forced to seek redress under State law or through the uncertain remedies which might be available in the federal courts. See *Jones* v. *Mayer Co., supra*, 392 U.S. at 414 n. 13. The debates on the 1875 law demonstrated an awareness of the need for more effective enforcement of the right: "the remedy is inadequate and too expensive, and involves too much loss of time and patience to pursue it. When a man is traveling, and far from home, it does not pay to sue every innkeeper who, or railroad company which, insults him by unjust discrimination" (2 Cong. Rec. 4082 (Senator Pratt)).

The congressional response to this problem was the dramatically enlarged federal role assumed by Section 2 of the 1875 Act. Although earlier laws had confined criminal penalties for interference with civil rights (other than voting) to official conduct or conspiracies, Section 2 made it a federal offense (a mis-

demeanor) for *any person,* even acting privately and alone, to deny equal treatment in public accommodations. And Section 3 directed federal officials to initiate prosecutions under the Act. Section 2 also provided for a fixed penalty of $500 which the aggrieved person could recover from the violator in a civil action exclusively in a federal court. In short, the apparent purpose and effect of the Civil Rights Act of 1875 was to focus particularly on one of the many rights secured by the 1866 Act which was appropriate for especially stringent federal enforcement. That is, of course, a fully adequate basis for the enactment of supplementary legislation.

D. THIS COURT'S DECISION IN THE *CIVIL RIGHTS CASES* IS NOT A VIABLE OBSTACLE TO OUR CONCLUSION

A question remains whether the decision in the *Civil Rights Cases,* 109 U.S. 3, does not foreclose our conclusion that the Civil Rights Act of 1866 outlaws racial discrimination in places of public accommodations. There are two possible difficulties: the first premised on the holding that the Act of 1875 was unconstitutional; the second on the distinction drawn in the opinion between the 1875 Act and the Civil Rights Act of 1866.

1. Insofar as the *Civil Rights Cases* denied the power of Congress under the Thirteenth and Fourteenth Amendments to reach racial discrimination in privately owned places of public accommodation, we think it plain that the authority of that ruling has been eroded by later decisions. The underlying premise of the Fourteenth Amendment holding in the *Civil Rights Cases*—that legislation enforcing the Equal Protection Clause can only reach discriminatory con-

duct by persons invoking the shield of State law—was rejected by a majority of the Court in *United States* v. *Guest*, 383 U.S. 745, 762 (Clark, J., concurring), 781–784 (opinion of Brennan, J.). But, for present purposes, it is enough to notice that the narrow view taken in the *Civil Rights Cases* with respect to congressional power under the Thirteenth Amendment is inconsistent with *Jones* v. *Mayer Co.*, *supra*.

We recognize that the Court in *Jones* did not, in terms, overrule the Thirteenth Amendment holding of the *Civil Rights Cases*, there being no occasion to confront the ruling directly. See 392 U.S. at 441 n. 78. But the Court did expressly hold that Section 2 of the Thirteenth Amendment authorizes legislation which does more than merely restore legal capacity to former slaves. Thus, it was stated that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation" (392 U.S. at 440). Accordingly, the Court expressly overruled *Hodges* v. *United States*, 203 U.S. 1, a decision holding—on the authority of the *Civil Rights Cases*—that Section 1981 could not validly bar racial discrimination affecting a contract of employment (392 U.S. at 441–443 n. 78). And, in language fully applicable here, the Court broadly held (392 U.S. at 443):

> Negro citizens North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to "go and come at pleasure" and to "buy and sell when they please"—would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in

> the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. * * * [Notes omitted.]

The thrust of the *Jones* opinion, we submit, is that it is *not* "'running the slavery argument into the ground"—as the majority in the *Civil Rights Cases* supposed (109 U.S. at 24)—to concede congressional power to attempt to eradicate the vestiges of the slave system wherever they persist in the public life of the community. Whatever the validity in 1883 of viewing admission to places of public accommodations as a mere matter of "social rights" (109 U.S. at 22) and characterizing the discriminatory exclusion by the proprietor as involving only a discretionary decision "as to the guests he will entertain" (109 U.S. at 24), that approach does not conform to the present reality. Cf. the opinion of Mr. Justice Douglas, concurring, in *Bell* v. *Maryland*, 378 U.S. 226, 245–246, 252–283. In light of the old common law obligation, imposed on at least some operators of public accommodations, it is difficult to appreciate that the privilege of obtaining entry and service without arbitrary discrimination was ever a mere "social" matter. But, at all events, it is today more properly deemed a "civil right." Cf. *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 251. In sum, we believe the constitutional power of Congress under the Thirteenth Amendment to reach racial discrimination in modern

places of public accommodations is no longer open to doubt.

2. We have already elaborated our view that the Congress of 1866 meant to outlaw the kind of discrimination revealed by this record. Even assuming the constitutionality of such an effort, however, the *Civil Rights Cases* may be invoked as apparently reaching the opposite conclusion, as a matter of statutory construction.

The objection, once again, is largely answered by the decision in *Jones* v. *Mayer Co.* Insofar as the prevailing opinion in the *Civil Rights Cases* characterizes the Civil Rights Act of 1866—in contrast to the Act of 1875—as merely removing legal "disabilities" (see 109 U.S. at 22), without in any way controlling the freedom of sellers to discriminate on racial grounds, that view has been squarely rejected by the Court. *E.g.*, 392 U.S. at 418–419, 436. And there is no better reason to accept the apparently equally narrow view of the "contract" clause espoused in that opinion. We add only that, assuming Section 1981 can properly be read as impliedly exempting certain personal transactions, and assuming further there was once a basis for considering the purchase of entry to a place of amusement as a purely "private" contract outside the scope of the provision, present circumstances would now justify treating such a transaction as a covered "public" contract.

E. THE PUBLIC ACCOMMODATIONS LAW OF 1964 DOES NOT AFFECT THE COVERAGE OF THE 1866 ACT

One final objection suggests itself: that enactment of the Civil Rights Act of that year (42 U.S.C. 2000a *et seq.*), in some way supersedes the provisions of the

1866 Act insofar as they deal with the same subject matter. Here, too, *Jones* v. *Mayer Co.* indicates the answer in rejecting a comparable argument premised on an interpretation of the Fair Housing Title of the Civil Act of 1968 (42 U.S.C. 3601 *et seq.*) as repealing or qualifying the "property" provision of the 1866 statute.

1. Of course, the understanding of the legislators of 1964 as to the intent of their predecessors a century earlier is only very remotely relevant. Certainly, it cannot override the clear indications given in 1866 and in 1875 that the original Civil Rights Act reached places of public accommodations. Accordingly, just as the Court did not look to the drafters of the Fair Housing Law of 1968 to determine the scope of Section 1982, here our construction of Section 1981 cannot be affected by the views prevailing in the 88th Congress. Nor is it even important to know what those views were: whether one assumes that the full scope of Section 1981 was or was not appreciated in 1964, it is clear that Title II of the Civil Rights Act of that year was not intended to repeal or supersede or amend the old statute.

2. We note first—as the Court did in *Jones* (392 U.S. at 413–417)—that there are substantial differences between the new law and the old. Title II of the 1964 Act prohibits discrimination on the basis of "race, color, religion, or national origin" (Section 201(a)), while 42 U.S.C. 1981 presumably is applicable only to race or color discrimination. Although Section 1981, on its face, prohibits all racially motivated denials of the right to enter into contracts, Title II applies only to certain types of establish-

ments having some nexus with interstate commerce (Sections 201(b), 201(c)). Section 1981 is couched in declaratory terms, without reference to any particular mode of enforcement, whereas Title II embodies a specific remedy provision (Section 204(a)). Significantly, the new law—unlike the old—expressly provides for enforcement at the instance of the Attorney General (Section 206), and the 1964 Act also created a Community Relations Service to assist in the private settlement of disputes relating to discriminatory practices (Title X, Sections 1001–1004, 42 U.S.C. 2000g–2000g–3). to which the courts may refer cases brought under Title II for the purpose of achieving voluntary compliance (Section 204(d)).

In many respects the differences are comparable to those between Section 1982 and the 1968 housing law which the Court noticed in *Jones*. Here, too, the old law is "a general statute applicable only to racial discrimination * * * and enforceable only by private parties acting on their own initiative," while the new legislation is a "detailed" and specialized enactment "enforceable by a complete arsenal of federal authority" (392 U.S. at 417). Accordingly, if we assume that the Congress of 1964 recognized the vitality and applicability of the Civil Rights Act of 1866—an assumption apparently indulged by the Court in *Jones* with respect to the drafters of the 1968 housing law—Title II can properly be viewed as special supplementary legislation, replacing the nullified Act of 1875, but leaving Section 1981 untouched.

3. It may be objected that our conclusion is sound only insofar as it focuses on those provisions of Title

II which *add* substantive guarantees or remedial machinery and ignores the fact that the new law in some respects *retrenches* on the broad coverage of Section 1981. The answer is that, confronted with the same situation with respect to the 1968 housing law, the Court in *Jones* did not on that account find a *pro tanto* repeal of Section 1982. The same result is compelled here.

There are of course many possible explanations for the limitations of the 1964 Act. Some were merely responsive to the Commerce Clause approach of the legislation and then prevailing constitutional doubts concerning the scope of congressional power under the Thirteenth and Fourteenth Amendments. Most likely, the full reach of Section 1981 in this area was not then appreciated.[8] But it does not follow that Section 1981 was repealed *sub silentio*. On the contrary, Title II expressly preserves pre-existing rights under federal law and that provision must of course be honored whether or not it was then recognized that Section 1981 was an operative statute with respect to public accommodations. Cf. *Jones* v. *Mayer*, *supra*, 392 U.S. at 437.

4. The savings clause is as follows (Section 207(b) of the Act, 42 U.S.C. 2000a–6(b)):

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[8] 42 U.S.C. 1981 and 1982 were briefly noted in the hearings on the Civil Rights Act as at least prohibiting State-sanctioned discrimination in places of public accommodation (Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess., p. 134 (Senator Prouty and Attorney General Kennedy)). It does not appear, however, that Congress understood those infrequently-used statutes to have the reach which has been confirmed by this Court's construction of 42 U.S.C. 1982 in *Jones*.

> * * * [N]othing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

It will be noticed that only rights under laws "not inconsistent" with Title II remain enforceable. That is no obstacle here, however. To the extent that Section 1981 prohibits racial discrimination by establishments which are not covered by Title II, it is not "inconsistent" with the 1964 Act in the ordinary sense that it contradicts the basic purpose of the new law; it obviously is designed to vindicate the same right. Moreover, the reference to State statutes and local ordinances makes it clear that a law with a more generous coverage was not "inconsistent" in the sense used here. For it goes without saying that Congress did not intend to invalidate State provisions which reach places of public accommodation left unregulated by the new federal law. It would be turning the statute on its head to read into it a purpose to confer on owners of non-covered establishments a federal right to practice racial discrimination, notwithstanding local legislation prohibiting it.

The conclusion that 42 U.S.C. 1981, which implements the Thirteenth Amendment, is repealed insofar as it applies to establishments not covered under Title II can rest only on the premise that Congress deliberately determined in 1964 that the Commerce Clause was to be the exclusive basis for *all* federal regulation

in respect of racial discrimination in public accommodations. There is no evidence of any such determination. Cf. *United States* v. *Johnson*, 390 U.S. 563, 566–567.* Nor is there any other indication that Congress meant to repeal the Civil Rights Act of 1866 in this respect. The result is that Section 1981 stands unimpaired.

II. THE EXCLUSION OF PETITIONERS, BY REASON OF THEIR RACE, FROM THE ENJOYMENT OF THE FACILITIES OF LAKE NIXON CLUB VIOLATES TITLE II OF THE CIVIL RIGHTS ACT OF 1964

Section 201(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000a(a)) guarantees to all persons, "without discrimination or segregation on the ground of race [or] color," "the full and equal enjoyment of the * * * services, facilities, privileges, [and] advantages * * * of any place of public accommodations." The Act prohibits any person from withholding or denying the right secured by Section 201, and authorizes an aggrieved party to institute a civil action for preventive relief (Sections 203(a) and 204(a), 42 U.S.C. 2000a–2(a) and 2000a–3(a)). Both the district court and the court of appeals held that petitioners were not entitled to relief under the 1964 Act because Lake Nixon Club is not a place of public accommodation as defined in Section 201. For the following reasons, however, we conclude that Lake Nixon is covered under either Section 201(b)(4) or Section

*We note that our interpretation of Section 207(b), since it relates to the enforcement by *individuals* of rights not specifically provided by Title II, is also fully consistent with the position taken in the dissenting opinion in *United States* v. *Johnson*, see 390 U.S. at 568 n. 1.

201(b)(3) of the Act (42 U.S.C. 2000a(b)(4), 42 U.S.C. 2000a(b)(3)).[10]

A. SECTION 201(b)(4) BRINGS LAKE NIXON WITHIN THE COVERAGE OF THE 1964 ACT

In addition to the specific types of establishments which are covered under Sections 201(b)(1) to 201(b)(3) if their operations affect commerce, Section 201(b)(4) extends the Act's prohibition against discrimination to any establishment which has a covered establishment located on its premises and which holds itself out as serving the patrons of the covered establishment. Respondent's testimony at trial showed that Lake Nixon maintained a snack bar for the convenience of patrons who used its other facilities. Thus, if the snack bar operation is covered under Section 201(b)(2), the entire establishment would be brought within the coverage of the Act. The district court held, however, that Section 201(b)(4) was inapplicable because Lake Nixon was a single enterprise whose principal business was the furnishing of recreational facilites, so that the snack bar could not be considered a separate establishment covered under the Act (A. 58).

The district court's ruling misconstrues Section 201(b)(4). Two of the major proponents of the bill explained to their colleagues in the House and Senate that a department store or other retail establishment

[10] This case does not present any question under the "private club" exemption of Section 201(e) of the Act (42 U.S.C. 2000a(e)). The district court found that Lake Nixon Club, despite its "membership" requirement, would not come "within the terms of any rational definition of a private club which might be formulated" under Section 201(e) (A. 57), and respondent did not challenge that finding on appeal.

which would not otherwise be covered would have to open "all its facilities" on a nondiscriminatory basis if it contained so much as a "lunch counter." Hearings on H.R. 7152 before the House Committee on Rules, 88th Cong., 2d Sess., 92 (Representative Celler); 110 Cong. Rec. 7406–7407 (Senator Magnuson). See also H. Rep. No. 914, 88th Cong., 1st Sess., p. 20. In *Fazzio Real Estate Co.* v. *Adams*, 396 F. 2d 146 (C.A. 5), affirming 268 F. Supp. 630 (E.D. La.), the court of appeals enunciated the correct principle in holding that a refreshment counter located within a bowling alley could be considered a separate establishment itself covered under the Act for the purpose of applying Section 201(b)(4) to the entire establishment (396 F. 2d at 149):

> It is clear that the Act, for purposes of coverage, contemplates that there may be an "establishment" within an "establishment."
> * * * [I]f it be found * * * that a covered establishment exists within the structure of a unified business operation, then under the provisions of § 201(b)(4) of the Act the entire business operation located at those premises becomes a "covered establishment." The Act draws no distinction with regard to the principal purpose for which a business enterprise is carried on.[11]

[11] Accord, *Scott* v. *Young*, 12 Race Rel. L. Rep. 428 (E.D. Va.) (recreational area-eating facility); *Evans v. Laurel Links, Inc.*, 261 F. Supp. 474 (E.D. Va.) (golf course-eating facility); *United States* v. *All Star Triangle Bowl, Inc.*, 283 F. Supp. 300 (D. S.C.) (bowling alley-eating facility); *United States* v. *Fraley*, 282 F. Supp. 948 (M.D. N.C.) (tavern-eating facility);

See *Hamm* v. *City of Rock Hill*, 379 U.S. 306, 309, where this Court held that a lunch counter in a department store which was operated as an adjunct to the main business of the store was a covered establishment within the contemplation of the Act.

There is no doubt on this record that the Lake Nixon snack bar is a "facility principally engaged in selling food for consumption on the premises" under Section 201(b)(2) (A. 32; see *Newman* v. *Piggie Park Enterprises, Inc.*, 377 F. 2d 433 (C.A. 4) (*en banc*), modified as to other issues and affirmed, 390 U.S. 400). It is a covered establishment if its operations affect commerce, *i.e.*, if it "serves or offers to serve interstate travelers or a substantial portion of the food which it serves * * * has moved in commerce" (Section 201(c)(2)). The court of appeals held that the Lake Nixon snack bar failed to satisfy either standard (A. 74–78).

In our view, the record establishes that the Lake Nixon Club (which, for this inquiry, is congruent with its snack bar) "offers to serve interstate travelers" within the meaning of Section 201(c)(2).[12] The court

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United States v. *Beach Associates, Inc.*, 286 F. Supp. 801 (D. Md.) (bathing beach-eating facility and tourist cottages). See also *Drews* v. *Maryland*, 381 U.S. 421, 428 n. 10 (Warren, C.J., dissenting), and Judge Heaney's dissent in the instant case (A. 82–86). Compare *Nesmith* v. *YMCA of Raleigh*, 397 F. 2d 96, 100 (C.A. 4) (dictum).

[12] On this analysis, it is unnecessary to consider whether a substantial portion of the food or its ingredients moved in commerce. However, we note that the district court took judicial notice that the principal ingredients of the bread products used and some ingredients in the soft drinks probably originated outside of Arkansas (A. 57). The use of the word "substantial" in the statute was intended to mean only that something "more than just [a] minimal," or more than a "*de minimis*" amount of the food had moved in commerce. See Hearings on

of appeals relied on the district court's finding that "there was no evidence that the Lake Nixon Club has ever tried to attract interstate travelers *as such*" (A. 74, 56, emphasis added). But we can find nothing in the legislative history of the Act to indicate that the "offers to serve" provision was intended to mean less than what it says and to apply only to those establishments which actively solicit the business of interstate travelers. Such a limited construction was implicitly rejected by this Court in *Hamm* v. *City of Rock Hill*, 379 U.S. 306, 309, where, although coverage under the Act does not appear to have been seriously disputed, the Court found an offer to serve interstate travelers in the fact that the lunch counter was located in a retail store that "invites all members of the public into its premises to do business." In *Gregory* v. *Meyer*, 376 F. 2d 509, 510 (C.A. 5), the court, in finding that a restaurant offered to serve interstate travelers, stressed the fact that "customers were not questioned as to tourist status, and that tourists were not rejected as customers." See also *Bolton* v. *State*, 220 Ga. 632, 140 S.E. 2d 866. And in *Wooten* v. *Moore*, 400 F. 2d 239, 242 (C.A. 4), the court cited a restaurateur's "readiness to serve white strangers without interrogation concerning their status" as evidence that he offered to serve interstate travelers, notwithstanding the fact that he had posted a sign on the door stating

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Civil Rights before Subcommittee No. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess., Part II, pp. 1384, 1386 (Attorney General Kennedy); Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess., pp. 172, 212 (Attorney General Kennedy and Assistant Attorney General Marshall); 110 Cong. Rec. 4856 (Senators Humphrey and Sparkman); *Willis* v. *Pickrick Restaurant*, 231 F. Supp. 396, 403 (N.D. Ga.), appeal dismissed, 382 U.S. 18; *Gregory* v. *Meyer*, 376 F. 2d 509, 511 (C.A. 5).

that the restaurant did not "cater to interstate patrons."

In the present case, the district court found that Lake Nixon was "open in general to all of the public who are members of the white race" (A. 57). When questioned about his admission policies at trial, respondent did not advert to any policy of excluding interstate travelers or any practice of questioning patrons to determine whether they were out-of-state residents (see A. 20–21). And as Judge Heaney noted in his dissent below (A. 88 n. 9), respondent's advertisements did not suggest that interstate travelers would not be admitted; nor did the membership cards require an applicant to state his address. In addition, respondent inserted advertisements for Lake Nixon in periodicals which were intended to reach interstate travelers: the "Little Rock Air Force Base," a monthly newspaper published at the base, and "Little Rock Today," a monthly magazine listing available attractions in the Little Rock area (A. 55–56; see petitioners' Petition for Rehearing *en banc* in the court below, A. 92, 96, which quotes from the masthead of the May 1968 edition of "Little Rock Today": "Published monthly and distributed free of charge by Metropolitan Little Rock's leading hotels * * * motels and restaurants to their guests, new comers and tourists * * *."). Although these advertisements were directed to "members" of Lake Nixon, there is little reason to assume, as Judge Heaney realistically observed, that travelers would be less likely than residents of the Little Rock area to understand that the "membership" device was used

solely to exclude Negroes from the publicly advertised facilities (A. 89).

The fact that Lake Nixon, unlike the restaurants in *Gregory* and *Wooten,* is not located on an interstate highway does not justify disregarding the other evidence that respondent offered to serve interstate travelers. Lake Nixon is not "some isolated and remote lunchroom" (*Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, 275 (concurring opinion of Mr. Justice Black)), which Congress' regulatory power under the Commerce Clause could reach only with evident strain. It is a large and profitable establishment which, Mrs. Paul testified, serves about 100,000 patrons each season (A. 43). An offer to serve such a large segment of the public without inquiry as to the residence of customers, under circumstances which make it reasonable to assume that some interstate travelers have accepted the offer, constitutes a sufficient connection with interstate commerce to support coverage of the establishment under Sections 201(b)(2) and 201(c)(2). See *Hamm* v. *City of Rock Hill,* 379 U.S. 306. Here, the offer to serve and the likelihood of actual service were so clear that the district court stated that "it is probably true that some out-of-state people spending time in or around Little Rock have utilized [Lake Nixon's] facilities" (A. 57).

In the light of the foregoing appraisal of the evidence, the failure of both courts below to find that the Lake Nixon snack bar offered to serve interstate travelers reflects an unduly restrictive construction of Section 201(c)(2) which deprives the Act of its intended scope. We conclude that the evidence demon-

strated that the snack bar was a covered establishment under Section 201(b)(2) and 201(c)(2) and, consequently, that the entire Lake Nixon Club was covered under Section 201(b)(4).[13]

B. SECTION 201(b)(3) BRINGS LAKE NIXON WITHIN THE COVERAGE OF THE 1964 ACT

Taken together, Sections 201(b)(3) and 201(c)(3) include within the Act's proscription of discrimination "any motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment" which "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce." The district court rejected petitioners' claim for relief under Section 201(b)(3) on the ground that the

[13] Though a decision reversing and remanding on the basis of Section 201(b)(4) would dispose of this case, we note that an order grounded only upon that section may be circumvented by respondent if he is prepared to remove all vestiges of the eating facility from the Lake Nixon premises. We stress, however, that mere closing of the eating facility at any time prior to the entry of an order by the district court upon remand should not be sufficient ground for dismissing the action as moot. The closing of the snack bar at this date would be for the purpose of defeating coverage. So long as the facilities for preparing and serving food remain on the premises they may be opened and put into use. Thus, unless the entire snack bar and all its facilities are totally removed from the Lake Nixon premises, the case could not be rendered moot under Section 201(b)(4). *Gray* v. *Sanders*, 372 U.S. 368, 376; *United States* v. *All Star Triangle Bowl, Inc.*, 283 F. Supp. 300, 302–303 (D. S.C.); *United States* v. *Beach Associates, Inc.*, 286 F. Supp. 801, 808 (D. Md.). Yet, respondent might well choose to take that step. Therefore, a determination of coverage under Title II should not in this case be rested upon Section 201(b)(4) alone.

"other place[s] of * * * entertainment" covered by the statute included only establishments where patrons were "edified, entertained, thrilled, or amused in their capacity of spectators or listeners" (A. 59). Alternatively, the court held that even if Lake Nixon were considered a place of entertainment, its operations did not affect commerce under Section 201 (c)(3) because the juke boxes, records, boats, and other amusement apparatus which respondent obtained from outside the State were no longer moving in interstate commerce (A. 61–62). The majority on the court of appeals affirmed, substantially on the grounds stated by the district court (A. 78–79, 81).

The decisions below are in conflict with the decision of the Court of Appeals for the Fifth Circuit *en banc* in *Miller* v. *Amusement Enterprises, Inc.*, 394 F. 2d 342, which reversed the ruling of a divided three-judge panel (391 F. 2d 86) that Section 201 (b)(3) did not cover a private amusement park which offered mechanical rides and an ice skating rink to white patrons. The full court held that a place of entertainment within the meaning of Section 201 (b)(3) included "both establishments which present shows, performances and exhibitions to a passive audience and those establishments which provide recreational or other activities for the amusement or enjoyment of its patrons" (394 F. 2d at 350). The court also concluded that "sources of entertainment" within Section 201(c)(3) include the equipment and apparatus used by the patrons of such an establishment, as well as the patrons themselves, who provide entertainment for those who come only to watch others

enjoy the park's facilities (*id.* at 349, 351). The court further held that the use of the term "move in commerce" in Section 201(c)(3) was not intended to exclude sources of entertainment, such as equipment, which *had moved* in interstate commerce but which had come to rest on the premises of the entertainment establishment (*id.* at 351–352).

In a lengthy memorandum submitted at the request of the panel which rendered the initial decision in *Miller* (printed as an appendix to the panel's opinion, 391 F. 2d 86, 89–96), the government analyzed the relevant portions of the legislative history of Sections 201(b)(3) and 201(c)(3) and advised the court that the history was "inconclusive" as to the question whether Congress intended to restrict coverage under those sections to places which offer performances for spectator audiences. We believe that is a correct statement. But it does not follow that the scope of the provision should be limited to what Congress undoubtedly meant to encompass. On the contrary, in the absence of a discernible legislative intent to restrict coverage to a certain class of entertainment facilities, we think the full court of appeals on rehearing in *Miller* correctly determined to give full effect to the statutory language according to its common understanding, so as not "to deprive citizens of the United States of the general protection which on its face [the statute] most reasonably affords"—to borrow the language of Mr. Justice Holmes, speaking for the Court in a related context (*United States* v. *Mosley*, 238 U.S. 383, 388). See also *United States* v. *Price*, 383 U.S. 787, 801; *United States* v. *Johnson*,

390 U.S. 563, 566–567; *Jones* v. *Mayer Co.*, 392 U.S. 409, 421, 437; *Amos* v. *Prom, Inc.*, 117 F. Supp. 615, 624 (N.D. Iowa).

To carve from Section 201(b)(3) an exception for Lake Nixon and similar establishments would violate the overriding purpose of Title II: "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." H. Rep. No. 914, 88th Cong., 1st Sess., p. 18. See *Heart of Atlanta Motel* v. *United States, supra,* 379 U.S. at 245–246, 291–292 (Goldberg, J., concurring); *Hamm* v. *City of Rock Hill, supra,* 379 U.S. at 315–316. We turn, then, to the statutory words which the courts below construed narrowly: "entertainment" in Section 201(b)(3) and "move" in Section 201(c)(3).

1. The dictionary defines "entertainment" as "the act of diverting, amusing, or causing someone's time to pass agreeably: [synonymous with] amusement" (Webster's Third New International Dictionary 757). No distinction is made between that which amuses or diverts one as a spectator or as a participant. Recreational activities such as swimming, boating, miniature golf, picnicking, and dancing—all offered at Lake Nixon—unquestionably amuse, divert, or agreeably engage a participant's attention; so also may sunbathing on a beach or watching others engage in the activities available at Lake Nixon. Indeed, respondent himself advertised over a local radio station that "Lake Nixon continues their policy of offering you year-round entertainment" (A. 88 n. 10).

Absent a clear showing that Congress intended to exclude establishments which offered such diversions

to the general public, to hold that the Lake Nixon Club is not a place of entertainment within the meaning of Section 201(b)(3) would violate the basic canon of statutory construction that the words of a law are presumed to be used in their ordinary and usual sense. Moreover, the facts of this case illustrate the precise problem which Congress considered in respect of its power to regulate interstate commerce. As Senator Magnuson, the floor manager of Title II, told the Senate (110 Cong. Rec. 7398, 7402):

> Discriminatory practices in places of amusement * * * often leads [sic] to the withholding of patronage by those affected, and in that way the normal demand for goods or entertainment is restricted. * * *
>
> * * * * * *
>
> These principles are applicable not merely to motion picture theaters but to other establishments which receive supplies, equipment or goods through the channels of interstate commerce. If these establishments narrow their potential markets by artificially restricting their patrons to non-Negroes, the volume of sales and, therefore, the volume of interstate purchases will be less.

In light of those concerns, it is most doubtful that Congress contemplated that an establishment like Lake Nixon, comprising several hundred acres of facilities and catering to about 100,000 patrons each season, would not be considered a place of entertainment despite the size of its market for interstate business.

We therefore conclude that the Lake Nixon Club is a place of entertainment within the meaning of Section 201(b)(3). That result is fairly comprehended by the language of the statute and is fully consistent with the spirit of the law. As the Fifth Circuit explained in its *en banc* opinion in *Miller*, to hold that this type of establishment is not covered by the Act "would be an injustice, and would be to pay homage to that same inequality which the laws of our land, the Congress in enacting them, the courts in interpreting them, and executive branch in its enforcement efforts have strived to eradicate" (394 F. 2d at 353).

2. The record clearly establishes that the operation of Lake Nixon affected commerce within the meaning of Section 201(c)(3). The district court found that Lake Nixon offers to serve the general public and that it is reasonable to assume that some interstate travelers, who may be viewed as providing entertainment for other patrons, have made use of its facilities (A. 57). The court also found that the juke boxes and some of the records, which furnished music for listening or dancing, were manufactured outside of Arkansas (A. 62), and the fifteen paddle boats which respondent rented for use on the lake were leased on a royalty basis from an Oklahoma company (A. 28–29; see A. 62, 90). Both courts below disregarded evidence of the interstate origin of these mechanical sources of entertainment because of their view that Section 201(c)(3) required a showing that the persons or products were continuously *moving* in interstate commerce. As shown above (p. 38, *supra*), however, Con-

gress was also concerned with the impediments which discrimination imposed on interstate commerce in entertainment equipment and supplies, which would usually be retained by the purchaser or lessee. Congress' determination to include such products within the operation of Section 201(e)(3) is demonstrated by the fact that it rejected an amendment to that section which would have required that the source of entertainment had "not come to rest within a state." 110 Cong. Rec. 13915, 13921. See S. Rep. No. 872, 88th Cong., 2d Sess., p. 3; *Miller* v. *Amusement Enterprises, Inc., supra,* 394 F. 2d at 351–352; cf. *Katzenbach* v. *McClung,* 379 U.S. 294, 302.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be reversed and the cause remanded for the entry of an appropriate order.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 488

MRS. DORIS DANIEL and MRS. ROSALYN KYLES,

Petitioners,

v.

EUELL PAUL, JR., Individually and as Owner, Operator or Manager of Lake Nixon Club,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE

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BRIEF OF AMICUS CURIAE

Statement

Petitioners' statement of the case is accepted but for the point that there is no evidence in the record showing that *Little Rock Today,* a magazine in which respondent advertised, is directed to tourists or newcomers.

Summary of Argument

Lake Nixon is a place of recreation operated for a profit. The fact that it is open to the white public in general is not sufficient to support a holding that it offers to serve interstate travelers. Its advertising is restricted to the local area. There is no evidence that it serves interstate travelers. There is no showing that a substantial portion of the food served by the snack bar at Lake Nixon moved in interstate commerce. Congress did not intend that Title II apply to an eating facility which is purely incidental to the operations of a business.

Lake Nixon presents no performances, productions, or exhibitions which move in interstate commerce. It is not a place of entertainment within the meaning of Title II even if this Court should give the broadest interpretation of that phrase. The recreation equipment of Lake Nixon are not sources of entertainment which move in commerce.

Section 1982 is not properly before the Court. Further, a ticket is a mere license which confers no property right upon its holder, and respondent's refusal to sell tickets to petitioners did not violate §1982. Section 1891 extended to all persons within the jurisdiction of the United States the capacity to contract. It does not require one person to enter into a contract with another. Therefore, respondent's refusal to sell petitioners tickets did not contravene §1891.

ARGUMENT

I.

Lake Nixon Club Is Not a Place of Public Accommodation Within the Coverage of Title II of the 1964 Civil Rights Act.

When President Kennedy proposed the 1964 Civil Rights Act, he did not intend that every business enterprise be included within the coverage of Title II which prohibits discrimination in places of public accommodation.[1] Nor did the final enactment extend the coverage so far. Senator Humphrey stated that the Act was of a moderate nature and did not cover all retail establishments. 110 Cong. Reg. 6533 (1964). The choice of which businesses are covered is within the exclusive power of Congress acting within Constitutional limitations. *Heart of Atlanta Motel* v. *U. S.*, 379 U.S. 241, 273 *(concurring opinion)* (1964). And, this Court held that Congress intended for Title II to apply only to those establishments having a "direct and substantial" relation to interstate commerce, where no state action is involved. *Heart of Atlanta Motel* v. *U. S.*, 379 U.S. 241, 250 (1964). Congress placed certain guidelines within Title II to enable the courts to make the proper determinations of which establishments have an effect upon interstate commerce within the meaning of the Act. Ap-

[1] Attorney General Robert F. Kennedy stated, "One can argue legitimately [from the moral principle involved] to the inclusion of all forms of business enterprises within the reach of the Constitution. The administration proposal did not attempt to extend Federal law so far." *Hearings on H.R. 7152 Before the House Committee on the Judiciary*, 88th Cong., 1st Sess., pt. 4, at 2655 (1963).

plication of these guidelines to the facts here involved indicates that Congress did not intend for the establishments such as Lake Nixon to come within the coverage of Title II of the 1964 Civil Rights Act.

A. *The Snack Bar Operations Do Not Bring Lake Nixon Within the Coverage of Title II of the 1964 Civil Rights Act.*

In order for Title II to apply to the snack bar operations it must either serve a substantial amount of food that has moved in commerce or serve or offer to serve interstate travelers. 42 U.S.C. §2000a(b)(2) and (c)(2).

Petitioners first contend that the snack bar at Lake Nixon offers to serve interstate travelers by the mere fact that it is open to the white public in general and state that what is important is that Lake Nixon does not *prohibit* interstate travelers from using its facilities. If by merely being open to the public in general an establishment is held to offer to serve interstate travelers, then the clear intention of Congress that not all retail establishments are covered would be abrogated. Further, the drafters did not contemplate that a failure to prohibit interstate travelers would bring an establishment within the coverage of Title II. The stipulated fact that a proprietor does not inquire as to whether customers are interstate travelers is not sufficient to determine that he offers to serve interstate travelers. *Codogan* v. *Fox*, 266 F. Supp. 866, 867 (M.D. Fla. 1967). The qualification that a certain type of establishment serves or offers to serve interstate travelers in order for Title II to apply was the method selected

by Congress to limit its coverage.[2] To uphold petitioners' contention would be to expunge the limitation.

The Act requires the complaining party to show that there is in fact service or an offer of service to interstate travelers. Petitioners offered no evidence that any interstate traveler had frequented Lake Nixon. The facts show that Lake Nixon was removed from the arteries of interstate travel. Its advertisements were restricted to the local area. Radio advertisements were addressed to members of the "club" (A. 43). Petitioners state that respondent placed an advertisement in a "tourist" magazine. The only evidence in the record on this point is that respondent placed one advertisement in one issue of a magazine entitled "Little Rock Today" (A. 12). There is no evidence in the record that this magazine is directed to tourists.

The cases upon which petitioners rely, which cases held that a restaurant or drive-in served or offered to serve interstate travelers, are founded upon facts not present here. In *Gregory* v. *Meyer*, 376 F. 2d 509 (5th Cir. 1967) the drive-in was located only three blocks from a federal highway. In *Evans* v. *Laurel Links, Inc.*, 261 F. Supp. 474, 476 (E.D. Va. 1966) it was not disputed that the golf course and its snack bar served interstate travelers who came there annually to participate in golf tournaments. In *Willis* v. *Pickrick Restaurant*, 231 F. Supp. 396 (N.D.

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[2] In answer to the question of why there were different tests provided for hotels than for other establishments, Attorney General Kennedy stated, "I think hotels and motels are quite clearly more involved in dealing with individuals traveling from one part of the country to another. . . . That's why we put in those qualifications." *Hearings on Miscellaneous Proposals Regarding Civil Rights Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong., 1st Sess., pt. 2, at 1400 (1963).

Ga. 1964) the restaurant was located on an interstate highway and advertised by means of billboards located along side interstate federal highways. None of the foregoing facts are present in this case, and the scant evidence presented by petitioners fails to establish that Lake Nixon served or offered to serve interstate travelers. The district court found that Lake Nixon did not attempt to attract interstate travelers, and that it was unlikely that an interstate traveler would break his trip to visit Lake Nixon. 395 F. 2d 412, 418 (A. 56-57). This finding is not clearly erroneous and is entitled to be upheld.

Petitioners next contend that Lake Nixon is subject to 42 U.S.C. §2000a(b)(2) and (c)(2) because a substantial portion of the food sold at the snack bar has moved in commerce. We agree with petitioners that "substantial" means more than minimal. *Gregory* v. *Meyer*, 376 F. 2d 509, 511 (5th Cir. 1967). It must be pointed out, however, that every case upon which petitioners rely, holding that a substantial portion of the food served had moved in commerce, contained either clear evidence or stipulations that a certain percentage of the food sold had in fact moved in commerce.[3] The only facts brought forth by petitioners in this case are that the snack bar serves hamburgers, hot dogs, soft drinks and milk and that the gross receipts from the food sales constitute almost 23% of the total gross

[3] *Gregory* v. *Meyer*, 376 F. 2d 509, 511 (5th Cir. 1967), $5000.00 of the sales were of coffee and tea which had moved in commerce and two thirds of the sales were of beef which had moved in commerce; *Katzenbach* v. *McClung*, 379 U.S. 294, 296 (1964), the evidence clearly showed that 46% of the sales were of meat which had moved in commerce; *Codogan* v. *Fox*, 266 F. Supp. 866, 867 (M.D. Fla. 1967), the parties stipulated that from 23% to 30% moved in commerce; and *Fazzio Real Estate Co.* v. *Adams*, 396 F. 2d 146, 148 n. 2 (5th Cir. 1968), it was not disputed that a substantial portion of the food served had moved in commerce.

receipts. The evidence of the gross receipts of a lunch counter operation does not furnish a basis for determining how much food moved in commerce. *Evans* v. *Laurel Links, Inc.*, 261 F. Supp. 474, 476 (E.D. Va. 1966). Petitioners couple the fact that four main items are sold with the observation of the district court that some of the ingredients in the bread come from out of state and reach the conclusion that 75% of the food sold contains out-of-state ingredients. Petitioners did not show how many nor in what amounts ingredients from outside Arkansas are used. Petitioners did not attempt to show the cost of out-of-state ingredients as compared to the total cost of the food items. Petitioners did not present evidence showing the origin of the meat used at the food counter. The Eighth Circuit took judicial notice that the milk was obtained in Arkansas. 375 F. 2d 118, 124. The burden was on petitioners to show that a substantial portion of the food served moved in commerce. The facts, or lack of evidence, clearly indicate that this burden was not met.

For the foregoing reasons, respondents assert that the snack bar operations were not covered by 42 U.S.C. §2000a (b)(2) and (c)(2), and that Lake Nixon does not come within the coverage of Title II because a covered establishment is located on the premises under 42 U.S.C. §2000a (b)(4) and (c)(4).

Respondents cannot agree with petitioners that the Eighth Circuit apparently requires two establishments under separate management for coverage under 42 U.S.C. §2000a(b)(4). At 395 F. 2d 118, 123, cited by petitioner, the Eighth Circuit discusses the district court's holding that the sale of food was a mere adjunct to the principal operations at Lake Nixon. However, the Court then con-

siders the facts presented by petitioners and concludes by holding that petitioners cannot recover because of a "complete absence of evidence" showing an effect upon commerce within the meaning of the Act. 395 F. 2d 118, 127 (A. 82).

Even though it is not necessary to the Eighth Circuit's decision, there is considerable merit to the district court's conclusion that Title II does not apply to the operations of the snack bar because its operation is purely incidental to the principal business of Lake Nixon. It is said in *Newman* v. *Piggie Park Enterprises*, 377 F. 2d 433, 435, *mod. and aff'd on other gds.*, 390 U.S. 400 (1968):

> The term "principally" did not appear in the bill as introduced. . . . Its inclusion . . . was intended to exclude from coverage places where food service was incidental to some other business.

The bill as introduced contained an "integral part" test to determine whether an establishment was covered because of its relationship to a covered establishment. It provided that an establishment was covered if " . . . such place or establishment is an integral part of . . . " an establishment otherwise covered.[4] Although this language was not adopted, it shows that the Act's sponsors did not intend that Title II cover an establishment because it incidentally served food. This same intent applies to the bill as enacted. Senator Magnuson, who was principal floor spokesman for the bill in the Senate, stated:

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[4] *Hearings on Miscellaneous Proposals Regarding Civil Rights Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong., 1st Sess., pt. 2, at 1404 (1963).

> . . . a bar in the strict sense of the word would not be covered by Title II since it is not *'principally'* engaged in selling food for consumption on the premises. 110 Cong. Reg. 7406 (1964). (Emphasis added.)

Cases involving lunch counters in retail concerns are distinguishable on the grounds that the Act specifically applies to such facilities and the establishments involved unquestionably had a direct and substantial relation to interstate commerce. *Hamm* v. *Rock Hill,* 379 U.S. 306 (1964).

Fazzio Real Estate Co. v. *Adams,* 396 F. 2d 146 (5th Cir. 1968) upon which petitioner relies is likewise distinguishable from the present case. Although that court said in dictum that there was no distinction with regard to the principal purpose of a business, it found that the refreshment counter there involved was not an "insignificant adjunct" to the bowling alley operations. In the present case the district court found that the snack bar operations were "purely incidental" to the operation of Lake Nixon. 263 F. Supp. 412, 417 (A. 53). This finding is supported by the evidence. Although the sale of food comprised almost 23% of the gross receipts (A. 13, 63), the net income produced by the snack counter was only $1,412.62 (A. 63) which was only 7% (A. 13) of the total net income. Viewing these facts in light of the Congressional intent to "exclude from coverage places where food service was incidental to some other business," lends clear support to the district court's decision.

B. *Lake Nixon Is Not a Place of Entertainment Which Customarily Presents Sources of Entertainment Which Move in Commerce Within the Meaning of Title II of the 1964 Civil Rights Act.*

A place of entertainment is within the coverage of Title II only if it affects commerce. 42 U.S.C. §2000a(b)(3). Two elements must be found to exist before the Act applies. First, the establishment must be a place of entertainment. Second, it must customarily present sources of entertainment which move in commerce.

The district court's application of the rule of *ejusdem generis* reaches the proper definition of the terms "place of entertainment" as intended by Congress. In the *Hearings on Miscellaneous Proposals Regarding Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 88th Cong., 1st Sess., pt. 4, at 1402-1403 (1963) Attorney General Kennedy was asked to submit a list of establishments prohibited from discrimination under Title II of the 1964 Civil Rights Act. The document he presented, under the section dealing with places of entertainment, spoke of establishments which present *performances, productions* and *exhibitions.* His use of those terms clearly indicates that the district court was correct in its decision that a "place of entertainment" within the meaning of the Act is an establishment where the patrons are spectators.[8]

Petitioners contend that Lake Nixon is covered by Title II even though a "place of entertainment" is construed to

[8] See, e.g., *Robertson v. Johnston,* 249 F. Supp. 618, 622 (E.D. La. 1966), where the court said, "Thus, 'place of entertainment' is not to be construed to mean 'place of enjoyment', but rather must be limited at least to 'place where performances are presented'."

mean an establishment which presents spectator activities. This contention fails to give proper consideration to the language of 42 U.S.C. §2000a(c)(3). That section requires that the establishment customarily *present* the entertainment. Conceding the questionable proposition that picnicking, sun-bathing, boating, dancing and swimming are "spectator activities", Lake Nixon does not *present* the people who perform these activities in order to attract customers from whom a fee is collected for viewing. The undisputed testimony is that patrons of Lake Nixon were charged only for what they *did*. They did not pay any fee to watch others perform (A. 27). Thus, Lake Nixon is not a place of entertainment within the meaning attached to those terms by Congress.

Petitioners contend that a broad interpretation should be given to the language "place of entertainment" in order to give effect to the overriding purpose of Title II to eliminate discrimination in facilities which were the focal point of civil rights demonstrations. There is no evidence that Lake Nixon should be considered such a focal point. In fact, the evidence presented leads to the conclusion that it is not a place as would be conducive of demonstrations. Petitioners were the only Negroes who ever attempted to use the facilities (A. 42). Lake Nixon is located in a placid country surrounding. It is not situated so that a demonstration would bring the desired effect of creating publicity tending to call the attention of the public to the discrimination. Thus, even under the broadest of interpretations, Lake Nixon is not a place of entertainment within the meaning of Title II of the 1964 Civil Rights Act.

Even should Lake Nixon be a "place of entertainment", it is not within the coverage of Title II because it does not

customarily present sources of entertainment which move in interstate commerce. As evidenced by Attorney General Kennedy's statement,[6] the drafters of Title II contemplated that an establishment present films, performers, lecturers, exhibitors and the like if it was to be covered by 42 U.S.C. §2000a(c)(3). The only performances presented were a diving exhibition and certain performances of dance bands. The evidence shows that neither of these sources of entertainment moved in commerce (A. 33), and the district court so held. 263 F. Supp. 412, 417 (A. 61). The only other evidence upon this point is that there are situated on the premises of Lake Nixon two juke boxes manufactured outside Arkansas which play records some of which come from out-of-state and that one yak was purchased and certain other boats were leased from an Oklahoma company. There is no evidence showing where the boats were manufactured or that they ever moved in interstate commerce. Upon these facts, the Eighth Circuit's conclusion that there is a total lack of evidence that the sources of entertainment move in interstate commerce must be affirmed.

Petitioners finally contend that Congress intended the bill to reach businesses which individually had a minimal or insignificant impact on interstate commerce. Suffice it to say that this Court held in *Heart of Atlanta Motel* v. *U. S.*, 379 U.S. 241, 250 (1964) that Title II of the 1964 Civil Rights Act applies only to those businesses having a direct and substantial relation to interstate commerce.

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[6] *Hearings on Miscellaneous Proposals Regarding Civil Rights Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong., 1st Sess., pt. 4, at 1402-1403 (1963).

II.

Lake Nixon's Refusal to Admit Petitioners Did Not Deny Them Any Rights Guaranteed by 42 U.S.C. §§1981 and 1982.

42 U.S.C. §1982 is not properly before the Court because it was not pleaded below. Petitioners assert that failure to plead a question in the lower courts does not preclude reliance upon it on appeal. This Court has, indeed, held that the mere failure to raise a constitutional question prior to a decision which supports it does not prevent a litigant from later invoking such a ground. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 143 (1967). However, even constitutional objections may be waived by a failure to raise them at a proper time so long as the waiver is of a known right or privilege. *Ibid.* That petitioners knew of the rights secured by §1982 cannot be doubted, for in their complaint they relied upon §1981 and §1983 of the same title. The other case upon which petitioners rely, *Thrope* v. *Housing Authority*, 37 U.S.L.W. 4068, 4072 (U.S. Jan. 13, 1969), held that as a general rule the appellate court must apply the law in effect at the time it renders its decision. Therefore, the court was bound to follow a federal regulation even though it had not been issued at the time the suit was commenced. The basis of the decision was that the appellate court was bound to follow the new law where it has been *changed* since the lower court's decision.[7] In the present case there was no change in the law. Section 1982 was enacted in 1866. It was available for petitioners'

[7] "A change in the law between nisi prius and an appellate decision requires the appellate court to apply the changed law." *Thrope* v. *Housing Authority*, 37 U.S.L.W. 4068, 4072 n. 38 (U.S. Jan. 13, 1969).

use at the time the complaint was filed. Petitioners simply did not rely upon §1982 as grounds for relief, and that failure should preclude them from urging it as grounds for reversal.

Even should petitioners be permitted to rely upon §1982 in this Court, it does not forbid the action taken by respondents in this case. The holding in *Jones* v. *Mayer Co.*, 392 U.S. 409, 413 (1968) is that §1982 bars all racial discrimination in the sale or rental of *property*. It is well settled that a ticket to enter a certain establishment does not create any property right. *Marrone* v. *Washington Jockey Club*, 227 U.S. 633, 636 (1912). A ticket is only a license to enter. *McCrea* v. *Marsh*, 12 Gray (78 Mass.) 211, 71 Am. Dec. 745 (1858). A license passes no property interest. Thomson, *Real Property*, §1032, p. 106 (1959 Repl.); *Wynn* v. *Garland*, 19 Ark. 23, 68 Am. Dec. 190 (1857); *Schuman* v. *Stevenson*, 215 Ark. 102, 219 S.W. 2d 429 (1949). Therefore, refusal to sell petitioners a ticket to Lake Nixon did not violate rights guaranteed by §1982.

Finally, petitioners contend that by refusing to sell them tickets to Lake Nixon respondents violated rights guaranteed by §1981. Section 1981 provides *inter alia* that all persons within the jurisdiction of the United States shall have the same right to make and enforce contracts as is enjoyed by white citizens. The purpose of the 1866 Civil Rights Act, of which §1981 was a part, was to abolish the incidents of slavery. *Jones* v. *Mayer Co.*, 392 U.S. 409, 440 (1968). One such incident of slavery was that Negroes had no capacity to contract. *Jones* v. *Mayer Co.*, 392 U.S. 409, 444 (*concurring opinion*) (1968). Therefore, a reasonable interpretation of §1981 is that it extended to

Negroes the same *capacity* to contract as is enjoyed by white citizens. This interpretation is further supported by the other language in the section. It grants all persons within the jurisdiction of the United States the same right "... to sue, be parties, [and] give evidence. ..." as is enjoyed by white citizens. Prior to the Thirteenth Amendment the Negro did not have the legal capacity to perform these acts.

However, by extending to Negroes the same capacity to contract as is enjoyed by white citizens, Congress surely did not intend that one person be allowed to force another to enter into a contract. White citizens have no right to compel other persons to enter into agreements with them. Section 1891 does not prohibit respondent's refusal to contract with petitioners, whatever may be the reason for that refusal. To hold otherwise would extend the scope of §1981 far beyond that intended by the Congress which enacted it.

Conclusion

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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hall, sports arena, stadium or other place of exhibition or entertainment; and

"(4) any establishment (A) . . . (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment."

Section 201 (c) sets forth standards for determining whether the operations of an establishment in any of these categories affect commerce within the meaning of Title II:

"The operations of an establishment affect commerce within the meaning of this subchapter if . . . (2) in the case of an establishment described in paragraph (2) [set out *supra*] . . . , it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) [set out *supra*] . . . , it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) [set out *supra*] . . . , there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States . . . ."

Petitioners argue first that Lake Nixon's snack bar is a covered public accommodation under §§ 201 (b)(2) and 201 (c)(2), and that as such it brings the entire establishment within the coverage of Title II under §§ 201 (b)(4) and 201 (c)(4). Clearly, the snack bar is "principally engaged in selling food for consumption on the premises." Thus, it is a covered public accommodation if "it serves or

offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce." We find that the snack bar is a covered public accommodation under either of these standards.

The Pauls advertise the Lake Nixon Club in a monthly magazine called "Little Rock Today," which is distributed to guests at Little Rock hotels, motels, and restaurants, to acquaint them with available tourist attractions in the area. Regular advertisements for Lake Nixon were also broadcast over two area radio stations. In addition, Lake Nixon has advertised in the "Little Rock Air Force Base," a monthly newspaper published at the Little Rock Air Force Base, in Jacksonville, Arkansas. This choice of advertising media leaves no doubt that the Pauls were seeking broad-based patronage from an audience which they knew to include interstate travelers. Thus, the Lake Nixon Club unquestionably offered to serve out-of-state visitors to the Little Rock area. And it would be unrealistic to assume that none of the 100,000 patrons actually served by the Club each season was an interstate traveler.[5] Since the Lake Nixon Club offered to serve and served out-of-state persons, and since the Club's snack bar was established to serve all patrons of the entire facility, we must conclude that the snack bar offered to serve and served out-of-state persons. See *Hamm* v. *Rock Hill*, 379 U. S. 306, 309 (1964); see also *Wooten* v. *Moore*, 400 F. 2d 239 (C. A. 5th Cir. 1968).

The record, although not as complete on this point as might be desired, also demonstrates that a "substantial portion of the food" served by the Lake Nixon Club snack bar has moved in interstate commerce. The snack bar serves a limited fare—hot dogs and hamburgers on buns,

[5] The District Court, which did not find it necessary to decide whether the snack bar served or offered to serve interstate travelers, conceded that "It is probably true that some out-of-State people spending time in or around Little Rock have utilized [Lake Nixon's] facilities." 263 F. Supp., at 418.

SUPREME COURT OF THE UNITED STATES

No. 488.—October Term, 1968.

Doris Daniel and Rosalyn Kyles, Petitioners, *v.* Euell Paul, Jr., etc.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 2, 1969.]

Mr. Justice Brennan delivered the opinion of the Court.

Petitioners, Negro residents of Little Rock, Arkansas, brought this class action in the District Court for the Eastern District of Arkansas to enjoin respondent from denying them admission to a recreational facility called Lake Nixon Club owned and operated by respondent, Euell Paul, and his wife. The complaint alleged that Lake Nixon Club was a "public accommodation" subject to the provisions of Title II of the Civil Rights Act of 1964, 42 U. S. C. § 2000 *et seq.*, and that respondent violated the Act in refusing petitioners admission solely on racial grounds.[1] After trial, the District Court, although finding that respondent had refused petitioners admission solely because they were Negroes,[2] dismissed the complaint on the ground that Lake Nixon Club was not within any of the categories of "public accommodations"

[1] Petitioners alleged that the denial of admission also constitutes a violation of the Civil Rights Act of 1866, as amended, 42 U. S. C. § 1981. Neither the District Court nor the Court of Appeals passed on this contention. Our conclusion makes it unnecessary to consider the question.

[2] Respondent at trial answered affirmatively a question of the trial judge whether Negroes were denied admission "simply . . . because they were Negroes." Respondent's answer to an interrogatory why Negroes were refused admission was "we refused admission to them because white people in our community would not patronize us if we admitted Negroes to the swimming pool. Our business would be ruined and we have our life savings in it."

covered by the 1964 Act. 263 F. Supp. 412 (1967). The Court of Appeals for the Eighth Circuit affirmed, one judge dissenting. 395 F. 2d 118 (1968). We granted certiorari. 393 U. S. 975 (1968). We reverse.

Lake Nixon Club, located 12 miles west of Little Rock, is a 232-acre amusement area with swimming, boating, sun bathing, picnicking, miniature golf, and dancing facilities and a snack bar. The Pauls purchased the Lake Nixon site in 1962 and subsequently operated this amusement business there in a racially segregrated manner.

Title II of the Civil Rights Act of 1964 enacted a sweeping prohibition of discrimination or segregation on the ground of race, color, religion, or national origin at places of public accommodation whose operations affect commerce.[3] This prohibition does not extend to discrimination or segregation at private clubs.[4] But, as both courts below properly found, Lake Nixon is not a private club. It is simply a business operated for a profit with none of the attributes of self-government and member-ownership traditionally associated with private clubs. It is true that following enactment of the Civil Rights Act of 1964, the Pauls began to refer to the establishment as a private club. They even began to require patrons to pay a 25-cent "membership" fee, which gains a purchaser a "membership" card entitling him to enter

[3] Section 201 (a) of the Act provides:

"All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

[4] Section 201 (e) of the Act provides:

"The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b)."

the Club's premises for an entire season and, on payment of specified additional fees, to use the swimming, boating, and miniature golf facilities. But this "membership" device seems no more than a subterfuge designed to avoid coverage of the 1964 Act. White persons are routinely provided "membership" cards, and some 100,000 whites visit the establishment each season. As the District Court found, Lake Nixon is "open in general to all of the public who are members of the white race." 263 F. Supp., at 418. Negroes, on the other hand, are uniformly denied "membership" cards, and thus admission, because of the Pauls' fear that integration would "ruin" the "business." The conclusion of the courts below that Lake Nixon is not a private club is plainly correct—indeed, respondent does not challenge that conclusion here.

We therefore turn to the question whether Lake Nixon Club is "a place of public accomodation" as defined by § 201 (b) of the 1964 Act, and, if so, whether its operations "affect commerce" within the meaning of § 201 (c) of that Act.

Section 201 (b) defines four categories of establishments as covered public accommodations. Three of these categories are relevant here:

> "Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce . . . .
>
> . . . . .
>
> "(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> "(3) any motion picture house, theater, concert

soft drinks, and milk. The District Court took judicial notice of the fact that the "principal ingredients going into the bread were produced and processed in other States" and that "certain ingredients [of the soft drinks] were probably obtained . . . from out-of-State sources." 263 F. Supp., at 418. Thus, at the very least, three of the four food items sold at the snack bar contain ingredients originating outside of the State. There can be no serious doubt that a "substantial portion of the food" served at the snack bar has moved in interstate commerce. See *Katzenbach* v. *McClung*, 379 U. S. 294, 296–297 (1964); *Gregory* v. *Meyer*, 376 F. 2d 509, 511, n. 1 (C. A. 5th Cir. 1967).

The snack bar's status as a covered establishment automatically brings the entire Lake Nixon facility within the ambit of Title II. Civil Rights Act of 1964, §§ 201 (b)(4) and 201 (c)(4), set out *supra;* see H. R. Rep. No. 914, 88th Cong., 1st Sess., at 20; *Fazzio Real Estate Co.* v. *Adams*, 396 F. 2d 146 (C. A. 5th Cir. 1968).[6]

Petitioners also argue that the Lake Nixon Club is a covered public accommodation under §§ 201 (b)(3) and 201 (c)(3) of the 1964 Act. These sections proscribe discrimination by "any motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment" which "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce." Under any accepted definition of "entertainment," the Lake Nixon Club would surely qualify as a "place of entertainment."[7] And indeed it advertises

[6] Accord: *Evans* v. *Laurel Links, Inc.*, 261 F. Supp. 474 (D. C. E. D. Va. 1966); *United States* v. *Fraley*, 282 F. Supp. 948 (D. C. M. D. N. C. 1968); *United States* v. *All Star Triangle Bowl, Inc.*, 283 F. Supp. 300 (D. C. D. S. C. 1968).

[7] Webster's Third New International Dictionary, at 757, defines "entertainment" as "the act of diverting, amusing, or causing someone's time to pass agreeably: [synonymous with] amusement."

itself as such.[8] Respondent argues, however, that in the context of § 201 (b)(3) "place of entertainment" refers only to establishments where patrons are entertained as spectators or listeners rather than those where entertainment takes the form of direct participation in some sport or activity. We find no support in the legislative history for respondent's reading of the statute. The few indications of legislative intent are to the contrary.

President Kennedy, in submitting to Congress the public accommodations provisions of the proposed Civil Rights Act, emphasized that "no action is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a Negro citizen who seeks only equal treatment—than the barring of that citizen from restaurants, hotels, theatres, *recreational areas* and other public accommodations and facilities."[9] (Emphasis added.) While Title II was being considered by the Senate, a civil rights demonstration occurred at a Maryland amusement park. The then Assistant Majority Leader of the Senate, Hubert Humphrey, took note of the demonstration and opined that such an amusement park would be covered by the provisions which were eventually enacted as Title II:

> "In this particular instance, I am confident that merchandise and facilities used in the park were transported across State lines.
>
> "The spectacle of national church leaders being hauled off to jail in a paddy wagon demonstrates the

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[8] Respondent advertised over a local radio station that "Lake Nixon continues their policy of offering you year-round entertainment."

[9] Special Message to the Congress on Civil Rights and Job Opportunities, June 19, 1963, in Public Papers of the Presidents, John F. Kennedy, 1963, at 485. This statement was originally made in a Special Message to the Congress on Civil Rights, Feb. 28, 1963, in Public Papers, *supra*, at 228.

absurdity of the present situation regarding equal access to public facilities in Maryland and the absurdity of the arguments of those who oppose Title II of the President's omnibus civil rights bill." 109 Cong. Rec. 12276 (1963).

Senator Magnuson, floor manager of Title II, spoke in a similar vein.[10]

Admittedly, most of the discussion in Congress regarding the coverage of Title II focused on places of spectator entertainment rather than recreational areas. But it does not follow that the scope of § 201 (b)(3) should be restricted to the primary objects of Congress' concern when a natural reading of its language would call for broader coverage. In light of the overriding purpose of Title II "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public," H. R. Rep. No. 914, 88th Cong., 1st Sess., at 18, we agree with the *en banc* decision of the Court of Appeals for the Fifth Circuit in *Miller* v. *Amusement Enterprises, Inc.*, 394 F. 2d 342 (1968), that the statutory language "place of entertainment" should be given full effect according to its generally accepted meaning and applied to recreational areas.

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[10] "Motion picture theaters which refuse to admit Negroes will obviously draw patrons from a narrower segment of the market than if they were open to patrons of all races . . . . Thus, the demand for films from out of State, and the royalties from such films, will be less.

"These principles are applicable not merely to motion picture theaters but to *other establishments which receive supplies, equipment, or goods through the channels of interstate commerce.* If these establishments narrow their potential markets by artificially restricting their patrons to non-Negroes, the volume of sales and, therefore, the volume of interstate purchases will be less." (Emphasis added.) 110 Cong. Rec. 7402 (1964).

The remaining question is whether the operations of the Lake Nixon Club "affect commerce" within the meaning of § 201 (c)(3). We conclude that they do. Lake Nixon's customary "sources of entertainment . . . move in commerce." The Club leases 15 paddle boats on a royalty basis from an Oklahoma company. Another boat was purchased from the same company. The Club's juke box was manufactured outside Arkansas and plays records manufactured outside the State. The legislative history indicates that mechanical sources of entertainment such as these were considered by Congress to be "sources of entertainment" within the meaning of § 201 (c)(3).[11]

Reversed.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I also rest on the Fourteenth Amendment. My views were set forth in *Bell* v. *Maryland*, 378 U. S. 226, 242, where I said:

> "Segregation of Negroes in the restaurants and lunch counters of parts of America is a relic of slavery. It is a badge of second-class citizenship. It is a denial of a privilege and immunity of national citizenship and of the equal protection guaranteed by the Fourteenth Amendment against abridgment by the States." *Id.*, 260.

And see my concurring opinion in *Atlanta Motel* v. *United States*, 379 U. S. 241, 279 *et seq.*

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[11] The Senate rejected an amendment which would have ruled out most mechanical sources by requiring that the source of entertainment be one which has "not come to rest within a state." 110 Cong. Rec. 13915-13921 (1964). See also the remarks of Senator Magnuson, *supra*, n. 10.

SUPREME COURT OF THE UNITED STATES

No. 488.—October Term, 1968.

Doris Daniel and Rosalyn Kyles, Petitioners, v. Euell Paul, Jr., etc.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 2, 1969.]

Mr. Justice Black, dissenting.

I could and would agree with the Court's holding in this case had Congress in the 1964 Civil Rights Act based its power to bar racial discrimination at places of public accommodations upon § 5 of the Fourteenth Amendment.[1] But Congress in enacting this legislation did not choose to invoke this broad Fourteenth Amendment power to protect against racial discrimination; instead it tied the Act and limited its protection to congressional power to regulate commerce among the States. Both courts below found that respondent's swimming and recreational place is covered by the Act if its operations "affect commerce" within the meaning of § 201 (c) of the Act. The Act itself, in § 201 (c), provides the test for determining whether this respondent's recreational operations adversely affect interstate commerce. That test is to determine from evidence whether the operations of an establishment like respondent's (a) "serves or offers to serve interstate travelers" or (b) "a substantial portion of the food which it serves, or gasoline, or other products which it sells, has moved in interstate commerce . . . ." In order, therefore, for the Act to be held to apply the

[1] "Congress shall have the power to enforce this article by appropriate legislation." U. S. Const., amend. XIV, § 5. See concurring opinion of Mr. Justice Clark, which I joined, in *United States* v. *Guest*, 383 U. S. 745, 761.

test must be shown to be met by evidence and judicial findings, not by guesswork, nor assumptions, nor "judicial knowledge" of crucially relevant facts, nor by unproven probabilities or possibilities. My trouble with the Court's holding is that it runs rough-shod over District Court findings supported by the record and emphatically affirmed by the Court of Appeals. Let us briefly review the facts and findings on the foregoing two separate conditions of the Act's applicability.

(A) Did Lake Nixon serve or offer to serve interstate travelers? There is not a word of evidence showing that such an interstate traveler was ever there or ever invited there or ever dreamed of going there. Nixon Lake can be reached only by country roads. The record fails to show whether these country roads are passable in all kinds of weather. They seem to be at least six to eight miles off the state or interstate roads over which interstate travelers are accustomed to traveling. Plaintiffs did not offer evidence to show whether Lake Nixon is a natural lake, or whether it is simply a small body of water obtained by building a dam across a little creek in a narrow hollow between the hills. The District Court made findings about Lake Nixon and Spring Lake[2] as follows:

> "Both are accessible by country roads; neither is located on or near a State or Federal highway. There is no evidence that either facility has ever tried to attract interstate travelers as such and the location of the facilities is such that it would be in the highest degree unlikely that an interstate traveler would break his trip for the purpose of utilizing either establishment." 263 F. Supp. 412, 418.

[2] The District Court held hearings and made findings concerning Lake Nixon and another establishment, Spring Lake, in a single trial. No appeal was taken from the District Court's decision holding that Spring Lake was not covered by the Act.

The foregoing finding is not impaired by this additional statement of the district judge:

> "Of course it is probably true that some out-of-state people spending time in or around Little Rock have utilized one or both facilities." *Ibid.*

In the first place the court's statement that "it is probably true" takes this out of the category of a finding of fact; and secondly, "out-of-State people spending time in or around Little Rock" who happened to visit Camp Nixon would certainly not be the kind of "interstate travelers" doing the kind of interstate traveling that would "affect" interstate commerce.

The Court of Appeals affirming the findings of the District Court said:

> "There is no evidence that any interstate traveler ever patronized this facility, or that it offered to sell interstate travelers . . . ." 395 F. 2d 118, 123.

This Court rejects these joint findings of the two courts below in this way. Referring to advertisements of Lake Nixon in a monthly magazine distributed at Little Rock hotels, motels, and restaurants, to radio announcements, and to advertisements in the Little Rock Air Force, this Court says:

> "Thus the Lake Nixon Club unquestionably offered to serve out-of-state visitors to the Little Rock area. And it would be unrealistic to assume that none of the 100,000 patrons actually served by the club each season was an interstate traveler."

In the above statement this Court jumps from the fact that there were an estimated number of admissions onto the club premises during a season to the conclusion that some one or more of these was an "interstate traveler" and that the owners of the premises, Mr. and Mrs. Paul, were bound to know that there were interstate travelers

present.[3] That conclusion is far too speculative to be used as a means of rejecting the solemn findings of the two courts below. If the facts here are to be left to such "iffy" conjectures, one familiar with country life and traveling would, it seems to me, far more likely conclude that travelers on interstate journeys would stick to their interstate highways, and not go miles off them by way of what, for all this record shows, may well be dusty, unpaved, "country" roads to go to a purely local swimming hole where the only food they could buy was hamburgers, hot dogs, milk, and soft drinks (but not beer). This is certainly not the pattern of interstate movements I would expect interstate travelers in search of tourist attractions to follow.

(B) The second prong of the test to determine applicability of the Act to Lake Nixon is whether a "substantial portion" of the hamburgers, milk and soda pop sold there had previously moved in interstate commerce. The Court's opinion generously concedes that the record is "not as complete on this point as might be desired. . . ." This is certainly no exaggeration. In fact, I would go further and agree with the two courts below that the record is totally devoid of evidence to show that a "substantial portion" of the small amount of food sold had previously moved in interstate commerce. The District Court found as follows on this point:

> "Food and soft drinks are purchased locally by both establishments. The record before the Court does not disclose where or how the local suppliers obtained the products which they sold to the establishments. The meat products sold by defendants may or may not have come from animals raised,

[3] In fact, Mr. Paul testified under oath that no interstate travelers were members of the "club," that they had not invited any to join, and that as far as he knew, none had ever used the premises.

> slaughtered, and processed in Arkansas. The bread used by defendants was baked and packaged locally, but judicial notice may be taken of the fact that the principal ingredients going into the bread were produced and processed in other States. The soft drinks were bottled locally, but certain ingredients were probably obtained by the bottlers from out-of-State sources." 263 F. Supp., at 418.

Fact-findings on serious problems like this one, which involves marking the jurisdictional authority of State and Nation, should not be made on the basis of "judicial notice" and on probabilities not based on evidence. The Court of Appeals approved this finding of the District Court that a substantial part of the food served at Lake Nixon had not previously moved in interstate commerce. The Court of Appeals said:

> "With regard to whether a substantial portion of the food which Lake Nixon serves has moved in commerce, the trial court found that food and soft drinks were purchased locally by the Club but noted that the record before the court did not disclose where or how the local suppliers obtained the products. The court further observed that the meat products sold by the defendants may or may not have come from animals raised, slaughtered, and processed in Arkansas. It also made an observation that the bread used in the sandwiches was baked and packaged locally but took judicial notice that the principal ingredients going into the bread were produced and processed in other states. This observation on the part of the court, however, was entirely voluntary, and the ingredients in the bread would not constitute a substantial part of the food served. We might add that it is a matter of common knowledge that Borden's of Arkansas, which the record

shows supplied the milk, obtains the unprocessed milk for its local plant from Arkansas dairy farmers." 395 F. 2d, at 124.

Finally the Court mentions, almost as an afterthought, Lake Nixon's 15 paddle boats leased from an Oklahoma company on a royalty basis. As to these paddle boats the Court of Appeals said: "It is common knowledge that annually thousands of this type boat are manufactured locally in Arkansas, and there is no evidence whatsoever that any of the equipment moved in interstate commerce." 395 F. 2d 118.

The Court's opinion also mentions a juke box leased by Lake Nixon from the juke box's local owner. The Court apparently refers to this juke box on the premise that playing music and dancing makes an establishment the kind of place of "entertainment" that is covered by § 201 (b)(3) of the Act.[4] The Court of Appeals pointed out that Senator Magnuson, floor manager of this part of the Act, said that dance studies would be exempt under the Act. 110 Cong. Rec. 7406. Also Senator Humphrey, a leading proponent of the measure said:

"The deletion of the coverage retail establishments generally is illustrative of the moderate nature o

[4] "(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

. . . . . .

"(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment;"

An establishment affects commerce within the meaning of this subsection if, according to § 201 (c) the Act, "it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; . . ."

this bill and of its intent to deal only with the problems which urgently require solution. 110 Cong. Rec. 6533."

See also *Miller* v. *Amusement Enterprises, Inc.*, 394 F. 2d 342.

It seems clear to me that neither the paddle boats nor the locally leased juke box are sufficient to justify a holding that the operation of Lake Nixon affects interstate commerce within the meaning of the Act. While it is the duty of courts to enforce this important Act, we are not called on, nor should we hold subject to that Act this country people's recreation center, lying in what may be, so far as we know, a little "sleepy hollow" between Arkansas hills miles away from any interstate highway. This would be stretching the Commerce Clause so as to give the Federal Government complete control over every little remote country place of recreation in every nook and cranny of every precinct and county in every one of the 50 States. This goes too far for me.[5] I would affirm the judgments of the two courts below.

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[5] In my opinion in *Katzenbach* v. *McClung*, 379 U. S. 294, 268, and *Atlanta Motel* v. *United States*, 378 U. S. 241, 268, concurring in the Court's decision upholding the application of this Act to an Atlanta, Georgia, motel and a Birmingham, Alabama, restaurant, I said:

"I recognize that every remote, possible, speculative effect on commerce should not be accepted as an adequate constitutional ground to uproot and throw into the discard all our traditional distinctions between what is purely local, and therefore controlled by state laws, and what affects the national interest and is therefore subject to control by federal laws. I recognize too that some isolated and remote lunchroom which sells only to local people and buys almost all of its supplies in the locality may possibly be beyond the reach of the power of Congress to regulate commerce, just as such an establishment is not covered by the present Act." 379 U. S., at 275.